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CRIMINAL LAW—PROSECUTORIAL DISCRETION OR CONTRACT THEORY RESTRICTIONS?--THE IMPLICATIONS OF ALLOWING JUDICIAL REVIEW OF PROSECUTORIAL DISCRETION FOUNDED ON UNDERLYING CONTRACT PRINCIPLES

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NOTES

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INTRODUCTION

The United States Federal Sentencing Guidelines ("Guidelines") are a set of sentencing rules which were enacted to require all federal judges to sentence defendants found guilty of like crimes to similar sentences.[1] The Guidelines were enacted to combat prejudicial and disparate sentencing for like defendants and require judges to incarcerate convicted defendants for a congressionally predetermined range of months based on a variety of factors.[2] The court may only reduce the predetermined sentence if the prosecutor files a "substantial assistance" motion requesting a downward departure.[3] A downward departure is a deviation from the

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1. See *infra* Part I.B for a further discussion of the Sentencing Guidelines.

2. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998); *see also* Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 569 (1998) (stating that the Sentencing Guidelines fill a need to "humanize" the criminal sentencing procedure and reduce "gross evils" and variable sentences that were present prior to the implementation of the Guidelines) (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER vii, x (1973)).

3. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998). A 5K1.1 motion, commonly referred to as a substantial assistance motion, is a motion from the prosecutor notifying the court that the defendant has provided information that assisted the prosecutor in apprehending and prosecuting other criminals. *See id.* This may include accomplices, suppliers, or other criminals with whom the defendant has interacted. *See id.* If the prosecutor finds the assistance to be adequate and useful, the prosecutor can request that the defendant be given a reduced sentence that is below the statutory minimum (otherwise known as a "downward departure"). *See id.* The prosecutor accomplishes this by filing a substantial assistance motion requesting a downward departure on behalf of the defendant. *See id.* Section 5K1.1 provides as follows:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
> (a) The appropriate reduction shall be determined by the court for reasons

mandatory statutory minimum and ultimately results in a reduction in the defendant's overall sentence.[4] The court cannot file this motion independently if the prosecutor decides not to do so.[5] Thus, only the prosecutor has the power to file a downward departure motion; however, it is entirely within the court's discretion to grant or deny the motion.[6] The prosecutor will only consider filing a downward departure motion if he or she is satisfied that the defendant has provided the prosecutor with substantial assistance. The "substantial assistance" given by the defendant must assist the prosecutor in prosecuting or investigating another who has committed a criminal offense.[7] If the prosecutor deems the defendant's assist-

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stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
(3) the nature and extent of the defendant's assistance;
(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
(5) the timeliness of the defendant's assistance.

Id. at 356.

4. *See id.* A substantial assistance motion is one of only two ways a defendant can deviate from the Guideline sentence. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1 and 5K2.0 (1998). Section 5K2.0 permits deviation from the Guidelines if an "aggravating circumstance" is present and the facts of the case involve factors not adequately taken into consideration by the drafters of the Guidelines. *Id.* § 5K2.0, at 357-58. Judges rarely use an aggravating circumstance as a reason for deviation since Congress created the Guidelines to be very broad and all encompassing. *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107-09 (1994) (stating that the purpose of the Guidelines was to increase prosecutorial discretion over sentencing and limit unchecked judicial discretion). This leaves little opportunity for judges to encounter a situation that is unique to the Guidelines. *See id.*

5. *See* United States v. Gutierrez, 908 F.2d 349, 351-52 (8th Cir. 1990) (stating that a district court is not permitted to depart downward under § 5K1.1 without a government motion), *aff'd by an equally divided court*, 917 F.2d 379 (8th Cir. 1990). The court also rejected the argument that that the government motion requirement was a nonbinding statement of public policy. *See id.*; *see also* Wade v. United States, 504 U.S. 181 (1992); United States v. Isaac, 141 F.3d 477, 481 (3d Cir. 1998); United States v. Easter, 981 F.2d 1549, 1555 (10th Cir. 1992).

6. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (stating that "[u]pon motion of the *government*. . .") (emphasis added); *see also Isaac*, 141 F.3d at 481 (stating that the decision to grant the motion is completely within the court's discretion); *see also* United States v. Forney, 9 F.3d 1492, 1498 (11th Cir. 1993) (stating that whether substantial assistance was given is a determination exclusively within the discretion of the prosecutor, and not the court).

7. See *supra* note 3 and accompanying text for the factors relevant for a substantial assistance motion.

ance truly beneficial and useful in a subsequent investigation or prosecution of another, the prosecutor may, but is not compelled to, file a substantial assistance motion with the court.[8] Once the prosecutor files the motion, the court may then examine several factors, such as the significance, usefulness, truthfulness, completeness, and reliability of the information, to ultimately determine whether to allow the prosecutor's motion and reduce the sentence below the predetermined range.[9] If a judge decides to allow the motion, the judge must determine the extent of the sentence departure.[10] While evidence of the defendant's assistance may tempt the sentencing court to depart from the Guidelines absent the prosecutors filing of a substantial assistance motion, the Guidelines prohibit the court from doing so.[11] Thus, the defendant's only chance at obtaining a prison sentence below the statutory minimum is by (a) acting in a manner which prompts the prosecutor to file a substantial assistance motion, and (b) having the motion filed before a judge who allows the prosecutor's motion and ultimately orders a reduced sentence.[12]

Defendants enter guilty pleas in nearly ninety percent of cases in which the Guidelines are applicable, and most involve some form of agreement with the prosecutor.[13] In many plea agreements, to

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8. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (implying that the decision to file a substantial assistance motion rests with the prosecutor because § 5K1.1 states "upon motion of the *government*") (emphasis added).

9. *See id.* Many critics of the Guidelines argue that these vague factors provide far too little guidance to the prosecutor and the defendant. *See* Lee, *supra* note 4, at 125 (stating that the lack of uniform prosecutorial policies results in vastly differing factorial applications).

10. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998). The motion imposes no mandatory obligation on the court, but rather increases the sentencing options available to the court. *See* United States v. Brittman, 872 F.2d 827, 828 (8th Cir. 1989) (stating that "[u]nder the Guidelines, sentencing judges retain discretion to accept or reject [the substantial assistance motion] and . . . depart from the Guidelines").

11. *See* United States v. Treleaven, 35 F.3d 458, 460 (9th Cir. 1994); *see also Isaac*, 141 F.3d at 481 (stating that "[t]he language of § 5K1.1 requires that the government make a motion before a district court can depart from the sentencing guidelines range in recognition of a defendant's substantial assistance").

12. *See* Lee, *supra* note 4, at 108 (stating that a judge may not order a reduced sentence unless the prosecutor files a substantial assistance motion). The effect of the government motion requirement is to give the prosecutor the authority to block a downward departure for substantial assistance. *See id.* at 112. If the prosecutor refuses to file the motion, the court cannot, on its own, impose a lower sentence. *See id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998).

13. *See* Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV 1253, 1264 (1994).

ensure full compliance and cooperation from the defendant, the government reserves the "sole discretion"[14] to determine whether or not the defendant has in fact provided substantial assistance.[15] This reservation of discretion by the prosecutor is an attempt to give the defendant the opportunity to obtain a lessened prison sentence in exchange for information regarding other criminal activity. A prosecutor may also include a sole discretion clause in a plea agreement in order to avoid judicial intervention in the prosecutor's decision to file or not file the substantial assistance motion.[16] For example, a sole discretion clause may be written as follows: "If the Government in its sole discretion determines that the defendant has fulfilled his obligations of cooperation as set forth [in the rest of the plea agreement], at the time of sentencing or within one (1) year thereof the government will . . . [m]ake a motion to allow the Court to depart from the Sentencing Guidelines . . . ."[17]

Because the defendant has a significant interest in having the prosecutor file a substantial assistance motion, the defendant is encouraged to assist the prosecutor to his or her fullest ability. Again,

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14. The Restatement of Contracts makes it clear that if the agreement leaves no doubt that it is only honest satisfaction that is meant and no more, it will be so interpreted, and the condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied. RESTATEMENT (SECOND) OF CONTRACTS § 228 cmt. a (1979). "In such cases the promisor is the sole judge of the quality of work, and his right to reject, if in good faith, is absolute and may not be reviewed by court or jury." JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 503 (3d ed. 1987). Where the agreement imposes a personal satisfaction requirement, the issue is whether the promisor acted in good faith, and the burden of proof is upon the party asserting the bad faith. *See id.* at 504 n.54.

15. *See* United States v. Forney, 9 F.3d 1492 (11th Cir. 1993). In *Forney*, the plea agreement stated that "the defendant understands that the determination as to whether he has provided 'substantial assistance' rests solely with the government. . . ." *Id.* at 1495. Similarly, in *United States v. Thompson*, No. 97-3172, 1998 WL 544313, at *1 (10th Cir. Aug. 26, 1998) (unpublished opinion), the plea agreement stated "if, in the sole opinion of the United States Attorney's office, the defendant's cooperation amounts to substantial [assistance], the government will file a motion, pursuant to section 5K1.1. . . ." *Id.* In *United States v. Courtois*, 131 F.3d 937 (10th Cir. 1997), the plea agreement stated that "the discretion and decision to file any motion . . . pursuant to § 5K1.1 (downward departure for substantial assistance) rests solely with the government." *Id.* at 938.

16. *See* John S. Austin, Note, *Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review* — United States v. Wade, 15 CAMPBELL L. REV. 263 (1993). The prosecutor is "uniquely competent" to decide whether to file a substantial assistance motion, and therefore that decision is "not well suited to judicial review." *See id.* at 284 (citing United States v. Smith, 953 F.2d 1060 (7th Cir. 1992)). The memorialization of sole discretion serves this principle. *See id.* at 284-85 (discussing the problems that would exist if the prosecutor did not have sole discretion).

17. United States v. Isaac, 141 F.3d 477, 479 (3d Cir. 1998).

absent a motion for sentence reduction, a defendant has no chance at getting a sentence less than the harsh statutory minimum. Frequently, however, the defendant does everything within his or her power to substantially assist the prosecutor, and yet the prosecutor still chooses not to file a sentence reduction motion.[18] Thus, the defendant has no chance of obtaining a sentence below the statutory minimum and is forced to endure the full extent of punishment, regardless of the extent of his or her prosecutorial assistance.

When the prosecutor refuses to file a substantial assistance motion, a defendant will usually attempt to challenge the decision by filing an interlocutory appeal.[19] On appeal, defendants argue that they have substantially assisted the government by providing information regarding criminal activity, yet have obtained no benefit in return.[20] The reviewing court must, however, first decide whether it has the power to review the prosecutor's refusal to file a substantial assistance motion.[21] Where the plea agreement explicitly vests the prosecutor with "sole discretion" to determine what constitutes "substantial assistance," the federal circuit courts have split on the issue of whether they have jurisdiction to perform this review. The majority of the circuits (hereinafter "the non-reviewing circuits")[22] have held that plea agreements are not contracts, and that a prosecutor's decision not to file a substantial assistance motion is completely within the prosecutor's discretion, and therefore unreviewable.[23] A minority of circuits (hereinafter "the reviewing

18. *See id.* at 480 (stating that while the defendant had met with the prosecutors and attempted to reveal all information in his possession, the government still chose not to file a § 5K1.1 motion); *see also* United States v. Certuche, No. 97-1327, 1998 WL 537778, at *1 (2d Cir. July 29, 1998) (unpublished opinion). In *Certuche*, the defendant and his son attempted to reveal all known information, yet the prosecutor remained unsatisfied. *See id.*

19. See BLACK'S LAW DICTIONARY 815 (6th ed. 1990), defining interlocutory appeal as: "An appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits."

20. *See* United States v. Burrell, 963 F.2d 976, 984 (7th Cir. 1992) (stating that "Burrell contends that his role in [the defendant's] guilty plea constituted substantial assistance to the government, and that he was entitled to a downward departure notwithstanding the government's failure to move for one. He buttresses his claim by recounting the harassment to which he and his family were subjected [to] as a result of the public perception, based upon the plea, that he was a 'snitch'").

21. *See Isaac*, 141 F.3d at 477, 484 (finding that a district court has jurisdiction to determine whether the government's refusal to file a § 5K1.1 motion . . . is attributable to bad faith and, accordingly, in violation of the plea agreement").

22. See *infra* Part II.A for a thorough discussion of the circuits that do not review a prosecutor's refusal to file a substantial assistance motion.

23. *See* United States v. Courtois, 131 F.3d 937, 938-39 (10th Cir. 1997) (stating that absent language obligating the government to file a substantial assistance motion,

circuits")[24] have held that sole discretion plea agreements are contracts.[25] These circuits have held that a court may review the prosecutor's decision not to file a substantial assistance motion using contract principles such as good faith, duress, illusory promise, and unconscionability.[26] Specifically, the reviewing circuits have held that even though the prosecution reserves the "sole discretion" to decide whether the defendant has provided substantial assistance, the court has the power to ensure that the prosecution acted in good faith when making that determination.[27]

Part I of this Note examines plea bargaining in general,[28] including the interplay between plea bargaining and the United States Federal Sentencing Guidelines.[29] Part I also explores the role of the prosecutor in the judicial system and the discretionary power he or she possesses.[30] This Part includes a discussion of an important Supreme Court decision that provides a basis for how courts should deal with prosecutorial discretion in general.[31] Lastly, Part I examines two important Supreme Court cases that provide the framework around which the issue regarding reviewability of a prosecutor's decision not to file a substantial assistance motion may be resolved.[32] Part II of this Note examines the circuit

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reviewability of prosecutorial discretion is only possible if the prosecutor's motivation was unconstitutional or "not rationally related to a legitimate government end"); *see also* Wade v. United States, 504 U.S. 181, 185-86 (1992) (stating that a prosecutor has the power, not a duty to file a 5K1.1 motion, and the prosecutor's decision can be challenged if it "was based on an unconstitutional motive").

24. See *infra* Part II.B for a thorough discussion of the circuits that do review a prosecutor's refusal to file a substantial assistance motion.

25. See *infra* Part II.B for a thorough discussion of contract applicability to plea agreements. *See Isaac*, 141 F.3d at 481-83.

26. See *infra* Part II.B for a discussion of the benefits and detriments of applying contract principles in this context. *See generally Isaac*, 141 F.3d at 481 (finding that plea agreements are "contractual in nature and [must] be analyzed under contract-law principles") (quoting United States v. Moscahlaidis, 868 F.2d 1357, 1361 (3d Cir. 1989)).

27. *See Isaac*, 141 F.3d at 484 (stating that the court should call upon the prosecutor to prove it acted in good faith when deciding not to file the substantial assistance motion); *see also* United States v. Imtiaz, 81 F.3d 262, 264 (2d Cir. 1998) (per curiam) (stating that "[a] court may review a prosecutor's refusal to recommend a downward departure for substantial assistance to determine if the prosecutor acted in bad faith").

28. See *infra* Part I.A for a discussion of plea bargaining principles.

29. See *infra* Part I.B.1 for a discussion of the interplay between plea bargaining and the Sentencing Guidelines.

30. See *infra* Part I.B.3 for a discussion of the role a prosecutor plays within the judicial system.

31. See *infra* Part I.B.3 for a discussion of the interplay between Supreme Court jurisprudence and prosecutorial discretion in general.

32. See *infra* Part I.B.4 for a discussion of the reviewability of prosecutorial discretion and United States Supreme Court jurisprudence.

split that has emerged as the courts of appeals have struggled with this issue.[33] Part III examines the implications of applying contract principles to plea agreements, and suggests that sole discretion plea agreements are not distinguishable from contracts.[34] Finally, Part III proposes an alternative method of resolving the issue of reviewing a prosecutor's decision not to file a substantial assistance motion by modifying the plea agreement to allow defendants to retain certain constitutional rights if they are dissatisfied with the prosecutor's decision.[35]

I. THE USE OF PROSECUTORIAL PLEA BARGAINING AND SUBSTANTIAL ASSISTANCE MOTIONS

A. *Plea Bargaining and Its Place in the Judicial System*

The plea bargain is a tool with longstanding judicial roots.[36] Many of the purposes for plea bargaining still exist today, even though prosecutors use plea bargaining differently than when the judiciary first implemented it.

1. Common Law Usage and Application

The common law recognized the practice of "approvement," under which an individual accused of a felony could receive a pardon.[37] This practice, which originated in England,[38] required an individual to reveal his or her accomplice and assist with the

33. See *infra* Parts II.A and II.B for a detailed discussion of the existing United States Circuit Courts of Appeals split.

34. See *infra* Parts III.A and III.B for a discussion of contract applicability and the potential consequences of this application.

35. See *infra* Part III.C for a discussion of the consequences of a proposed congressional statutory modification.

36. *See* Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 757-60 (1998) (discussing the longstanding practice of plea bargaining throughout American history); *see also* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 8 (1992) (stating that the "[m]odern [plea bargaining] practice thus has ancient roots").

37. *See* Hughes, *supra* note 36, for a discussion of plea bargaining at common law.

38. *See* Justin M. Lungstrum, Note, United States v. Singleton: *Bad Law Made in the Name of a Good Cause*, 47 U. KAN. L. REV. 749, 775 n.25 (1999) ("The doctrine of approvement, which 'offered formal pardons to certain classes of fugitive offenders on condition that they surrender, confess themselves guilty, and procure the capture and conviction of their colleagues,' had been codified in England in the seventeenth and eighteenth centuries.") (quoting John L. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 94 (1983)).

conviction of that accomplice.[39] Apart from approvement, which had become unpopular by the eighteenth century, there also existed an informal practice by which an accused, though not legally entitled to do so, could obtain a pardon by confessing to the act and revealing his or her accomplice(s).[40] If satisfied with the defendant's assistance, the monarch, or his or her direct servants, would grant the plea to the defendant.[41] Although this practice of pardoning was often applied in a prejudicial manner,[42] both of these early English practices served an important function in the judicial system prior to the industrial revolution. Namely, because of the lack of forensic technology and organized police forces, these methods were the only means by which the government could procure information and effectively apprehend multiple criminals.[43]

2. Modern Usage and Application

Although the modern plea agreement varies greatly from its ancient predecessor, the underlying "bargain" principle remains the same.[44] Today, only the prosecutor has the power to enter into a plea agreement with a defendant, as opposed to earlier times when

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39. *See id.* See BLACK'S LAW DICTIONARY 102 (6th ed. 1990), which defines approvement as:

> [A] practice of criminal prosecution[ ] by which a person accused of treason or felony was permitted to exonerate himself by accusing others and escaping prosecution himself. The custom existed only in capital cases, and consisted in the accused, called "approver," being arraigned and permitted to confess . . . or accuse another as his accomplice of the same crime in order to obtain his pardon.

According to the definition of approver, if the approver "failed to convict those he accused" of being his accomplices, he was immediately hung. *See id.*

40. Lord Mansfield described this informal practice as follows:

> Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act[s] fairly and openly and discover[s] the whole truth, though he is not entitled of right to a pardon . . . the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy.

The Whiskey Cases, 99 U.S. 594, 600 (1879) (paraphrasing Lord Mansfield in *Rex v. Rudd*, 98 Eng. Rep. 1114, 1116 (1775)).

41. *See generally id.*

42. *Cf.* Hughes, *supra* note 36, at 7-8 for a related discussion of plea bargaining in Great Britain.

43. *See id.* It was "essential to procure [an] accomplice['s] testimony in order to track down or build a case against a major criminal." *Id.* at 7. It was customary to prominently offer pardons to accomplices who would come forward to testify and convict co-conspirators. *See id.* It was also common to offer cash payments to witnesses who came forward and testified about the illegal act. *See id.* at 7-8.

44. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101

it was the monarch who acted as prosecutor and judge.[45] In modern times, the accused gives up fundamental rights in exchange for a lessened sentence, or at least the possibility of a lessened sentence.[46] In return, the prosecutor secures a conviction and gains valuable information about other criminal activity.[47] In *The Whiskey Cases*,[48] the United States Supreme Court approved of plea bargaining, so long as the prosecutor did not force the defendant to incriminate himself.[49] While the Supreme Court has approved of plea bargaining in general, it has not specifically created a standard or test to determine how much information the defendant must divulge in order to obtain a reduced sentence or "downward departure."[50] Presently, the determination of the adequacy of information is made entirely by the prosecutor.[51]

YALE L.J. 1909, 1910 (1992). "Plea bargains are, as the name suggests, bargains; [and] it seems natural to argue that they should be regulated and evaluated accordingly." *Id.*

45. See Guidorizzi, *supra* note 36 for a general discussion of the origins and history of plea bargaining. *See* People v. Gallego, 424 N.W.2d 470, 473 (Mich. 1988) (stating that "the police possess neither the authority to withhold prosecution nor to grant immunity, [and] no formal system exists by which to check the potentially unbridled discretion the police would possess if allowed to make binding promises precluding prosecution"; only the prosecutor has such power).

46. The accused, in exchange for a plea, may give up such valuable constitutional rights as the right to stand trial, face one's accuser, proclaim one's innocence, and defend oneself. *See* United States v. Isaac, 141 F.3d 477, 483 (3d Cir. 1998).

47. *See* Jean Choi DeSombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103, 120 (1995). The author states:

> In ideal plea bargaining, the defendant and the state are on a level playing field and both parties benefit by an arrangement reached through a plea bargain: the defendant, in exchange for providing the prosecutor with valuable information, i.e., a confession to the crime, receives a sentence or charge reduction and the state in return for its leniency disposes of the case quickly and thereby saves resources.

Id.

48. 99 U.S. 594 (1879).

49. *See id.* at 596.

50. *See generally id.*; U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998).

51. *See* United States v. Burrows, 36 F.3d 875, 884 (9th Cir. 1994) ("In the absence of arbitrariness or unconstitutional motivation . . . we must abide by the prosecutor's decision."); see also Austin, *supra* note 16, at 284-85 for a discussion of the limitations placed on judicial review of prosecutorial discretion. The prosecutor plays an integral part in the judicial system, and therefore is allowed vast discretion. *See id.* at 279-80. The prosecutor has the discretion to prosecute, decide what charges to press, obtain a search warrant, choose the witnesses to be presented to the grand jury, decide whether to seek joint trial of persons or offenses, and whether to enter into a plea bargain with the defendant. *See id.* at 280.

3. Benefits of Plea Agreements

A defendant convicted of a federal crime faces fairly strict congressionally predetermined sentences that judges are restricted from modifying.[52] The United States Constitution confers upon every criminal defendant basic constitutional rights.[53] These rights include the right to face his or her accuser, the right to remain silent, the right not to self-incriminate, the right to be heard, the right to a jury of his or her peers, and the right to plead not guilty, just to name a few.[54] Furthermore, the defendant has the right to force the prosecutor to move forward with trial and prove his or her case against the defendant.[55] In addition, although charged with a criminal act, the defendant still retains his or her freedom to contract.[56] Thus, the defendant may attempt to enter into a binding plea agreement with the prosecutor to avoid these strict penalties.[57]

Moreover, "[t]he prosecutor has the right to seek the maximum sentence for the maximum offense that can be proven at trial," within ethical boundaries.[58] Consequently, a defendant has an incentive to bargain with the prosecutor. "If the freedom to exchange entitlements[59] were denied altogether in the allocation of

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52. *See generally* U.S. SENTENCING GUIDELINES MANUAL (1998).

53. *See* U.S. CONST. amend. VI. The Sixth Amendment provides the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence[sic].

Id.

54. *See* Gilmore v. Taylor, 508 U.S. 333, 362 (1993); Williams v. Florida, 399 U.S. 78, 112 (1970); Boykin v. Alabama, 395 U.S. 238, 243 (1969).

55. *See* United States v. Murphy, 65 F.3d 758, 763 (9th Cir. 1995) (stating that a plea bargain deters a defendant from exercising his constitutional right to proceed with trial and forces the prosecutor to prove his case) (citing Bordenkircher v. Hayes, 434 U.S. 357, 362-64 (1978)).

56. *See* United States v. Johnson, 979 F.2d 396, 399 (6th Cir. 1992) (stating that a defendant's right to contract is constitutional).

57. *See generally* Anjili Soni & Michael E. McCann, *Twenty-Fifth Annual Review of Criminal Procedure, Preliminary Proceedings: Guilty Pleas*, 84 GEO. L.J. 1039 (1996)("There is no constitutional right to plea bargain. However, prosecutors must comply with equal protection requirements when . . . plea bargaining. Rule 11(e) of the *Federal Rules of Criminal Procedure* governs the conduct of the government and the defendant during plea negotiations . . . and authorizes plea agreements . . . .").

58. Scott & Stuntz, *supra* note 44, at 1914.

59. Entitlement is defined as the "[r]ight to benefits, income or property which may not be abridged without due process." BLACK'S LAW DICTIONARY 532 (6th ed. 1990).

criminal punishment, defendants would not have the option of pleading guilty in exchange for foregoing the burden and expense of a full trial. That is, not only plea bargains, but unbargained-for guilty pleas would be forbidden."[60] Therefore, a defendant retains the right to bargain, make offers, and accept offers, even though other rights may be restricted or taken away upon arrest.[61] The prosecutor acquires certain rights when he or she enters into plea negotiations with the defendant.[62]

Plea agreements have societal importance beyond the interests of the individual parties.[63] For example, a plea agreement provides a method by which a prosecutor can dramatically increase the rate of successful prosecutions because whenever the defendant pleads guilty, the prosecutor avoids a possible "not guilty" jury verdict.[64] Furthermore, the prosecutor can avoid expending significant energy, time, and costs by avoiding trial. In turn, the plea agreement dramatically reduces the overburdened federal dockets.[65] When a prosecutor adds a substantial assistance element to the traditional plea agreement, the prosecution may also obtain valuable information about other criminal activity.[66] Criminal defendants also benefit from the use of plea agreements because pleading guilty to a lesser offense allows defendants to avoid the maximum penalty for their accused crime and the stigma often related to that penalty.[67]

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60. Scott & Stuntz, *supra* note 44, at 1913.

61. *See* Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992) (noting that although the defendant retains many rights after arrest, a person loses some rights to personal privacy otherwise protected by the Fourth Amendment); *see also* Yale H. Yee, Note, *Criminal DNA Data Banks: Revolution for Law Enforcement or Threat to Individual Privacy?*, 22 AM. J. CRIM. L. 461, 476 (1995) (discussing *Jones v. Murray* and the constitutionality of collecting blood samples from convicted felons in order to create a DNA database).

62. The prosecutor has the right to accept or deny the final draft of the plea agreement. *See* Austin, *supra* note 16, at 280-81.

63. *See* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1129 (1998) ("A settlement is societally efficient, compared to the alternative of requiring each party to keep what they have; namely, their chance of winning at trial, with all attendant risks and benefits.").

64. *See* Scott & Stuntz, *supra* note 44, at 1915 ("Plea bargaining provides a means by which prosecutors can obtain a larger net return from criminal convictions, holding resources constant.").

65. *See id.*; *see also* Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (noting that plea agreements have become a necessity in today's administration of justice). See *infra* Part I.A.4 for further discussion of the societal importance of plea bargaining.

66. *See* Scott & Stuntz, *supra* note 44, at 1915.

67. *See id.* By utilizing the plea bargain system, "[c]riminal defendants, as a group, are able to reduce the risk of the imposition of maximum sanctions." *Id.*

Likewise, the defendant gains the possibility of a sentence reduction below the congressionally proscribed minimum sentence if he substantially assists the prosecutor.[68]

Thus, a plea agreement generally involves two parties who may each benefit from the cooperation of the other.[69] Either party can propose a possible plea agreement, but only the prosecutor has the power of acceptance.[70] Therefore the ultimate decision to enter into a plea agreement rests with the prosecutor.[71] Because this gives the prosecutor the overall bargaining advantage, the prosecutor begins negotiations with the upper hand.[72] Once the prosecutor decides that a plea agreement could benefit the government, the prosecutor will usually make the initial offer to the defendant.[73] After the initial offer is made, negotiating the major terms of the plea agreement can be difficult for the defendant because of the defendant's constant inferior bargaining position.[74] Ultimately the parties may reach a mutual agreement based on offer and acceptance.[75] Some courts classify this transaction as contractual in nature, irrespective of its criminal context, and allow contract enforceability doctrines to apply.[76] These courts have reasoned

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68. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998).

69. *See* Eric S. Baker, Note, *Double Jeopardy and Its Application to Broken Plea Agreements*, 31 ARIZ. L. REV. 127, 137 (1989). "Plea agreements offer benefits to both the state and the defendant. Courts recognize the advantages of plea bargaining in easing court dockets and aiding in a more effective judicial system." *Id.* Thus, it is crucial to require that plea agreements be honored in order to ensure that both parties will continue to derive a benefit. *See id.*

70. *See* Jeffrey Standen, *Plea Bargain in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1478 (1993) (stating that "[o]ne important feature of prosecutors' monopsony power is the ability, in the presence of the judge, to dictate the [final] price, that is, the terms, of plea agreements"); *see generally* Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987 (1995).

71. *See* Acevedo, *supra* note 70, at 994 (stating that the prosecution has absolute control over the entire plea bargaining process).

72. *See id.*

73. *See id.*

74. *See* Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 579 (1977) (stating that "the right to reject the proposed plea bargain is largely chimerical. Fear of heavier sentence after trial and deference to advice of defense counsel might lead defendants to accept virtually all plea agreements"); *see also* United States v. Bradbury, 189 F.3d 200, 206 (2d Cir. 1999) (stating that the "Government . . . enjoys significant advantages in bargaining power").

75. See BLACK'S LAW DICTIONARY 1082 (6th ed. 1990), which defines offer and acceptance in a bilateral contract as "the two elements which constitute mutual assent, a requirement of the contract."

76. *See* United States v. Isaac, 141 F.3d 477, 481 (3d Cir. 1998) (stating that exchange of consideration between parties constitutes a binding enforceable agreement);

that because plea bargains are contractual in nature, it is appropriate to analyze the agreements using contract principles.[77]

4. The Modern Judicial System's Dependence Upon Plea Bargaining

Today, the disposition of criminal charges by an agreement between the prosecutor and the defendant is an essential element of the administration of justice.[78] Plea bargaining agreements are highly desirable because they offer prompt final dispositions of most criminal cases.[79] Plea bargaining enhances whatever chances the guilty have of receiving a lesser sentence.[80] Most criminal prosecutions are settled without a trial because both sides feel the benefits of plea bargains outweigh going to trial.[81] Even if a defendant is clearly guilty, and the prosecution has overwhelming evidence, the plea saves the resources of the legal system and allows the prosecutor to secure a conviction without expending the time and energy required for trial.[82] In plea bargaining, the "rule of law is invariably sacrificed to the rule of convenience."[83] Plea bargaining has, in

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see also United States v. Kahn, 920 F.2d 1100, 1105 (2d Cir. 1990) (stating that "[c]ooperation agreements, like plea bargains, may usefully be interpreted with principles borrowed from the law of contract"); United States v. Rexach, 896 F.2d 710, 713 (2d Cir. 1990) (stating that "[c]ooperation agreements, like plea bargains, are interpreted according to principles of contract law").

77. *See supra* note 76; *see also* Scott & Stuntz, *supra* note 44, at 1968 ("The time has come to put rights talk to one side and view plea bargaining through the lens of contract."); Julie Lumpkin, Note, *The Standard of Proof Necessary to Establish That a Defendant Has Materially Breached a Plea Agreement*, 55 FORDHAM L. REV. 1059, 1067 (1987) (stating that "[c]ourts that have addressed plea bargain disputes have used to some extent a contract law framework and terminology to analyze and describe plea agreements").

78. *See* Santobello v. New York, 404 U.S. 257, 260 (1971) (stating that "[i]f every criminal charge were subjected to a full-scale trial, the State and the Federal Government would need to multiply by many times the number of judges and court facilities").

79. *See generally*, Holly L. Nickerson, Note, 75 U. DET. MERCY L. REV. 741, 746 (1998) ("'The criminal justice system now disposes of virtually all cases of serious crime through plea bargaining.'") (citation omitted). "Further, '[g]iven the prevalence of its use, it is not surprising that the Supreme Court of the United States has labeled plea bargaining "as an essential component of the administration of justice."'" *Id.* (citation omitted).

80. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (listing 5K1.1 as one of the very few ways to deviate from the rigid Guideline sentencing grid).

81. *See* Scott & Stuntz, *supra* note 44, at 1915 (observing that prosecutors benefit by obtaining larger net returns from criminal convictions and conserving resources, while defendants reduce the risk of having to serve maximum sentences).

82. *See* Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 53-56 (1968).

83. *Id.* at 85.

fact, become a necessity because of the overwhelming number of defendants and lack of processing resources.[84]

Prior to 1987, if a court sentenced a defendant to prison, it was virtually impossible to predict the sentence he would receive because of the judge's use of subjective criteria in formulating sentences.[85] Pre-Guideline judges were free to utilize any factors they deemed relevant to sentence a defendant, such as the offender's personality, social background, motivation for criminal conduct, and the potential for effective correctional treatment.[86] Such broad discretion led to non-uniform sentencing throughout the federal court system. In an effort to curb inconsistent sentences, Congress created the Sentencing Guidelines.[87]

B. *The Sentencing Guidelines*

Prior to an objective system of sentencing guilty defendants, the courts could use virtually any factor about the defendant to influence their sentencing decisions.[88] "This resulted in a wide range

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84. *See id.* at 54-55.

85. *See* Karen Bjorkman, Note, *Who's the Judge? The Eighth Circuit's Struggle with Sentencing Guidelines and the Section 5K1.1 Departure*, 18 WM. MITCHELL L. REV. 731, 734-35 (1992).

86. *See id.*

87. *See id.* at 736 (stating that the Guidelines were conceived to further the creation of an honest and uniform sentencing procedure). Between the mid-1920's and the mid-1970's there was less need for plea bargains because the incarceration rate was remarkably low, averaging approximately 110 prisoners per 100,000 United States citizens. *See* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 743 (1993); *see also* People v. West, 477 P.2d 409, 413-14 (Cal. 1970) (stating that the judicial system depends on the existence and usage of plea bargaining to function). Over the past two decades the prison population rate has increased dramatically. In 1991, federal and state correctional facilities housed 823,414 inmates, an increase of 150% in eleven years, or 310 sentenced prisoners per 100,000 United States citizens. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 1991 (1992). Overall, these numbers far exceed incarceration capacity in state and federal facilities. *See id.* at 7. Therefore, it is in the judicial system's best interest to reduce the number of prisoners and the duration of their incarceration. *But see generally* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983)(arguing that plea bargains undercut the moral aspects of criminal law because private party compromises destroy any notion of an objective societal determination of moral guilt, regardless of the fact that the American judicial system is based on this notion).

88. *See* S. REP NO. 98-225, at 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221; *see also* Ryan M. Zenga, Note, *Retroactive Law or Punishment for a New Offense—The Ex Post Facto Implications of Amending the Statutory Provisions Governing Violations of Supervised Release*, 19 W. NEW ENG. L. REV. 499, 502-03 (1997) (stating that "[b]ecause sentencing laws [prior to the enactment of the Guidelines] provided

of sentences for defendants who had committed very similar crimes, and [this disparity] was identified by Congress as a primary justification for changing the system."[89] To overcome judicial biases against defendants and to permit sentencing based wholly on objective criteria, Congress created the Sentencing Guidelines.[90]

1. How the Guidelines Work to Promote Consistency

Before the implementation of the Guidelines in 1984, plea agreements allowed defendants to avoid the virtual free reign federal district courts possessed regarding sentencing.[91] "For almost a century, the Federal Government employed . . . a system of indeterminate sentencing" in which statutes specified penalties for only a small number of crimes.[92] Other statutes generally gave the sentencing judge wide discretion to decide whether to incarcerate the offender and for how long, whether to fine him and how much, or whether to impose some lesser restraint, such as probation.[93]

This indeterminate sentencing system exemplified Congress' desire to rehabilitate defendants, rather than punish them.[94] Con-

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little guidance, federal sentencing judges were 'left to apply [their] own notions of the purposes of sentencing'") (citation omitted).

89. Zenga, *supra* note 88, at 503 (citing S. REP. NO. 98-225, at 38, *reprinted in* 1984 U.S.C.C.A.N 3221).

90. *See* Antoinette Marie Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants*, 53 MONT. L. REV. 75, 76-77 (1992). The purpose of the Guidelines is to "'enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.'" *Id.* (quoting Sentencing Commission *Guidelines Manual*, Part A—Introduction, at 1.2).

91. *See* United States v. Tucker, 404 U.S. 443, 446-47 (1972) (finding that a sentence imposed by a federal district judge is generally not subject to review and may be based on independent factors deemed relevant by the judge).

92. Mistretta v. United States, 488 U.S. 361, 363 (1989). Under this system, "[t]he actual period of imprisonment [was ultimately] based on the offender's . . . progress, as determined by a parole board." Bjorkman, *supra* note 85, at 734; *see also* Zenga, *supra* note 88, at 502-03. Parole permits a conditional release from incarceration and allows the parolee to serve the remainder of his or her sentence outside of an institution. *See* Thomas v. Arizona State Bd. of Pardons & Paroles, 564 P.2d 79, 81 (Ariz. 1977). In contrast, probation is a sentence imposed whereby the criminal is not institutionalized, but rather placed under the supervision of a probation officer. *See* State v. Fields, 686 P.2d 1379, 1387 (Haw. 1984).

93. *See Mistretta*, 488 U.S. at 363. According to the Court:

> Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system.

Id. at 364.

94. *See* Williams v. New York, 337 U.S. 241, 248 (1949). In *Williams*, the United

gress referred to this system of sentencing as the "rehabilitation model."[95] Under this system, Congress would enact criminal statutes; sentencing judges would impose sentences within a defined permissible statutory range; and the Parole Commission[96] would determine the actual length of the defendant's sentence.[97] There was no requirement that the judge specifically state any reason for the chosen sentence in the record.[98] Thus, judges could consider factors about the defendant that were unrelated to the crime and impose their own notions of justice.[99] This broad discretion eventually resulted in "demonstrably disparate treatment of similarly situated [defendants]."[100] Although the Supreme Court had praised the degree of latitude given to trial judges,[101] the Court has criti-

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States Supreme Court endorsed the intermediate model of sentencing and stated that "[r]etribution is no longer the dominant objective of . . . criminal [sentencing]. Reformation and rehabilitation of offenders have become [the] important goals of criminal jurisprudence." *Id.*

95. *See* S. REP. NO. 98-225, at 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221; *see also* Zenga, *supra* note 88, at 502.

96. See BLACK'S LAW DICTIONARY 1117 (6th ed. 1990), which defines parole commission as "[t]he state and federal administrative bodies empowered to decide whether inmates shall be conditionally released from prison before completion of their sentences."

97. *See* S. REP. NO. 98-225, at 40, *reprinted in* 1984 U.S.C.C.A.N. at 3223. The Parole Commission would then have the ultimate responsibility of setting a release date upon a determination that the prisoner was rehabilitated.

98. *See* Fisher, *infra* note 99, at 745. Because judges were not required to memorialize their reasons for sentencing, "'[o]ne judge may sentence in order to rehabilitate, another to deter the offender . . . from committing a similar crime, a third to incapacitate, while a fourth may sentence simply to 'punish.'" Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1115 (1992) (quoting PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM viii (1977)). "The pre-Guidelines process encouraged the presentation of [many] legitimate viewpoints." *Id.*

99. *See* Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 3-4 (1991); *see also* David Fisher, *Fifth Amendment—Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions*, 83 J. CRIM. L. & CRIMINOLOGY 744, 745 (1993) (stating that disparate treatment was due to the "unfettered discretion" granted to the judges in determining sentences, which allowed them to implement their own individual principles).

100. *See* Selya & Kipp, *supra* note 99, at 4.

101. *See* Williams v. New York, 337 U.S. 241, 249 (1949). According to the Court:

> A sentencing judge is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

cized the system for allowing disparate treatment of similarly situated individuals.[102]

In addition to the mounting criticism of disparate sentencing outcomes, theoretical questions about the effectiveness of the rehabilitation model caused many courts to strongly challenge the indeterminate sentencing system.[103] After all, the purpose of the system was to allow sentencing judges to work with prosecutors and parole officers to determine the most effective way to rehabilitate the defendant.[104] Although the rehabilitative model allowed judges to individually tailor each sentence to best fit the individual defendant, rehabilitation soon fell into irreparable disfavor with the public.[105] As the philosophy behind the rehabilitative model was questioned,[106] courts began examining and applying the retributive model of sentencing.[107] This philosophical change away from the intermediate system resulted in the belief that incarceration ought to serve retributive goals as opposed to rehabilitative goals.[108] Although judges became less concerned with rehabilitation, it was eventually found that the retributive sentencing was sporadic and unpredictable.

Calls for limits on judicial discretion in sentencing prompted Congress to enact the Sentence Reform Act of 1984 (the "Act").[109] The Act authorized the creation of the United States Sentencing

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Id. at 247.

102. The Supreme Court recognized that disparate treatment of similarly situated individuals led Congress to create sentencing guidelines. *See* McCleskey v. Kemp, 481 U.S. 279, 312 n.35 (1987).

103. *See* Mistretta v. United States, 488 U.S. 361, 363-67 (1989) (finding that in fact, 28 U.S.C. § 994(k) rejects rehabilitation, and states that imprisonment "should serve retributive, educational, deterrent, and incapacitative goals").

104. *See id.* at 363.

105. *See* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 555-56 (1993) (stating that "the belief that judges (or anyone else) can impose sentences to rehabilitate has fallen into disfavor. While many continue to think that we should try to reform offenders once punishment has been fixed under an independent rationale, any 'diagnosis' of the prisoner made at sentencing is an unsound basis for determining the severity of punishment") (citation omitted); *see also* Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 552 (1978) ("Even if the state could achieve its rehabilitative objectives far more often then it does, we have become doubtful that an offender's wrongdoing justifies a broad assumption of governmental power of his personality. Moreover, almost every means of rehabilitating criminals has been tried, and almost nothing seems to work.").

106. *See Mistretta*, 488 U.S. at 366.

107. *See id.* at 367.

108. *See id.*

109. *See id.* at 366-67.

Commission (the "Commission"), which was responsible for promulgating a set of objective sentencing guidelines.[110] The Act was initially included in Title II of the Comprehensive Crime Control Act of 1984.[111] Specifically, the Commission sought to craft guidelines designed to: (1) provide certainty and fairness; (2) avoid unwarranted sentencing disparities among defendants with similar criminal records who have been found guilty of similar criminal conduct; and (3) maintain sufficient flexibility to permit individualized sentences when warranted.[112]

The Guidelines require a judge to proceed through a seven-step process in order to determine a sentence.[113] This seven-step

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110. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 1 (1998); *see also* G. Adam Schweickert III, Note, *Third-Party Cooperation: A Welcome Addition to Substantial Assistance Departure Jurisprudence*, 30 CONN. L. REV. 1445, 1451 (1998) (stating that the goal of the Act was to "'[e]stablish sentencing policies and practices for the Federal criminal justice system that . . . [would promote overall fairness]'") (quoting Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2018).

111. *See* The Federal Sentencing Guidelines: A Report on the Operation of the Guideline System and Short Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining, Pub. L. No. 98-473, § 236, 98 Stat. 1837, 2033 (1984).

112. See 28 U.S.C § 991 (1994), which states the following:

> (a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member . . . .
>
> (b) The purposes of the United States Sentencing Commission are to—
>
> (1) establish sentencing policies and practices for the Federal criminal justice system that—
>
> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
>
> (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Id.; *see also* Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799, 801 (1994) (citing 28 U.S.C. § 991(b)(1)(B)(1999)); Schweickert, *supra* note 110, at 1451.

113. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (1998) (discussing the application instructions in general); *see also* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 44 (1994). *See generally* Stephen Breyer, *The Federal Sentenc-*

process includes a calculation that takes into account all factors deemed relevant by the Commission.[114] Some factors, like the use of a deadly weapon in the commission of a crime, will add to the sentence, while other factors, such as remorse, will allow a reduction in the sentence.[115] The Commission created consistency by providing a narrow range of sentences from which a judge could choose when sentencing a defendant with a given set of criminal characteristics, thereby reducing judicial discretion.[116]

One factor that the sentencing judge may take into account when formulating a sentence is the defendant's "acceptance of responsibility."[117] If the defendant admits to the crime and takes full responsibility for his or her share of the criminal act, the judge may use that admission in a sentence reduction calculation.[118] The acceptance of responsibility factor is separate and distinct from "substantial assistance."[119] The acceptance of responsibility entitles the defendant to no more than a two-level reduction within the prescribed sentencing range,[120] whereas substantial assistance can result in a far more significant downward departure and a sentence far below the statutory minimum, regardless of acceptance of responsibility.[121] The categorization of a statement as substantial

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ing Guidelines and the Key Comprises upon Which They Rest, 17 HOFSTRA L. REV. 1 (1988) (discussing the workings of the Guidelines).

114. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (1998); *see also* DRESSLER, *supra* note 113, at 44; Breyer, *supra* note 113, at 6-7.

115. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(c) (1998) (stating that adjustments in sentencing can be made for factors relating to the victim, the defendant's role in the crime, and obstruction of justice); *see also* Fisher, *supra* note 99, at 746-48.

116. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (1998); *see also* Fisher, *supra* note 99, at 746-47. Compare these judicial limitations to pre-guideline sentencing where the judge was free to determine which, if any, of the defendant's characteristics would be taken into account. See *supra* note 99 and accompanying text for a discussion of the broad discretion given to sentencing judges prior to the enactment of the Sentencing Guidelines.

117. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(e) (1998) (allowing for an adjustment "as appropriate for the defendant's acceptance of responsibility").

118. *See id.* § 3E1.1. The Comments to section 3E1.1 define acceptance of responsibility as "(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable . . . ; b) voluntary termination or withdrawal from criminal conduct or associations; (c) voluntary payment of restitution prior to adjudication of guilt . . . ." *Id.*

119. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 *with* § 5K1.1.

120. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1998) (stating that "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels"). See *infra* note 124 and accompanying text for a discussion of "levels."

121. *See* Daniel J. Sears, *Practice Under the Federal Sentencing Guidelines: Bar-*

assistance as opposed to acceptance of responsibility can literally mean the difference between serving life in prison and serving 15 to 20 months in prison.[122] Thus, a defendant has a significant interest in obtaining a substantial assistance motion from the prosecutor.[123]

More specifically, the Guidelines involve a grid that contains "forty-three offense levels on its vertical axis and six criminal history categories on its horizontal axis," for a total of 258 sentencing ranges.[124] There is one sentencing range for "each possible combination of offense level and criminal history category."[125] This system virtually removes all discretion from the judge because the judge is forced to sentence within a very narrow range of congressionally mandated sentences.[126]

In *Mistretta v. United States*,[127] the plaintiff challenged the constitutionality of the Guidelines on the grounds that they (1) amounted to excessive delegation of legislative power, and (2) were a violation of the separation of powers principle.[128] After a lengthy evaluation of the issues (and a dissent by Justice Scalia), the Supreme Court held that the Guidelines were constitutional because there was no excessive delegation of legislative power and therefore no violation of the separation of powers principle.[129]

a. Legislative history

The common law distributed federal sentencing among the

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gaining for Freedom, 22 COLO. LAW 485, 485-86 (1993) (stating that it is not possible to argue that taking responsibility will compensate for a possible lack of a substantial assistance motion because the sentencing rewards are not comparable).

122. *See id.* at 487.

123. *See id.* at 488-89.

124. *See* Selya & Kipp, *supra* note 99, at 6; *see also* U.S. SENTENCING GUIDELINES MANUAL, Sentencing Table (1998). The grid sentences range from 0-6 months to life imprisonment. *See id.*

125. *See* Selya & Massaro, *supra* note 112, at 801; *see also* Selya & Kipp, *supra* note 99, at 6.

126. *See* U.S. SENTENCING GUIDELINES MANUAL, Sentencing Table (1998); *see also* Selya & Massaro, *supra* note 112, at 801-03; Selya & Kipp, *supra* note 99, at 6-8.

127. 488 U.S. 361 (1989).

128. *See id.* at 370. The United States Supreme Court has "long insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Id.* at 371-72 (quoting Field v. Clark, 143 U.S. 649, 692 (1892)). The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1.

129. *See Mistretta*, 488 U.S. at 384 (stating that the petitioner's fears about eroding structural protections appear "to be 'more smoke than fire,' and do not compel us to invalidate Congress' considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing").

three branches of the United States government.[130] The Sentencing Reform Act[131] established the United States Sentencing Commission (the "Commission")[132] as an independent part of the Judicial Branch of the United States[133] "to promulgate guidelines establishing sentencing ranges for different categories of federal offenses and defendants."[134] The Commission attempted to compile a list of goals based on this congressional objective, yet philosophical problems arose concerning the Commission members' "differing perceptions of the purposes of criminal punishment."[135] Some members of the Commission argued that an "appropriate punishment should be defined primarily on the basis of the moral principle of 'just desserts.'"[136] Other members felt that punishment should primarily be imposed on the basis of "practical 'crime control' considerations."[137] For now, the Commission has sought to resolve this philosophical difference by applying an empirical approach that uses data-estimating factors utilized by the existing sentencing system as a starting point.[138]

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130. *See* Kirk D. Houser, Comment, *Downward Departures: The Lower Envelope of the Federal Sentencing Guidelines*, 31 DUQ. L. REV. 361, 363 & n.20 (1993) (stating that "Congress defined the maximum sentence, the district judge imposed either probation or a sentence within a statutory range, and a parole official of the Executive Branch eventually determined the actual duration of imprisonment").

131. 28 U.S.C. §§ 991-998 (1984) (Title II of the Comprehensive Crime Control Act of 1984).

132. *See generally* U.S. SENTENCING GUIDELINES MANUAL (1998); *see also* John M. Dick, Note, *Allowing Sentence Bargains to Fall Outside of the Guidelines Without Valid Departures: It Is Time for the Commission to Act*, 48 HASTINGS L.J. 1017, 1020 (1997) ("All members are appointed by the President [of the United States] 'by and with the advice and consent of the Senate,' and they are 'subject to removal . . . by the President only for neglect of duty or malfeasance in office . . . .'") (quoting 28 U.S.C. § 991(a)(1994 & Supp. II 1996)).

133. *See* Houser, *supra* note 130, at 363. In creating the Commission, Congress did not delegate excessive legislative power, but instead, constitutionally called "upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within [the expertise] of judges." *Mistretta*, 488 U.S. at 412.

134. Williams v. United States, 503 U.S. 193, 195, (1992).

135. *See* SENTENCING GUIDELINES AND POLICY STATEMENT 1.3 (1987).

136. *Id.* (stating that under this principle, "punishment should be scaled to the offender's culpability" and the harms resulting from the criminal act. "Thus, if the defendant is less culpable, the defendant deserves less punishment").

137. *Id.* (stating that "[d]efendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant").

138. *See id.* at 1.4. Using the empirical system, the Commission has analyzed data drawn from 10,000 pre-sentence investigations in order to determine which distinctions are important in sentencing. *See id.* This approach has allowed the Commission to create a condensed list of relevant distinctions that comprise the separate Guideline factors. *See id.* The empirical system is considered a compromise between the "just

The Act attempted to incorporate all of the Commission's goals[139] into an objective empirical system.[140] After a period of intensive review the Commission issued initial guidelines that took effect on November 1, 1987.[141] The Act further mandated that the Commission study the impact and implementation of the Guidelines.[142] Congress intended for the impact evaluation to focus on data for the four-year period immediately following the implementation of the first draft of the Guidelines.[143] The governing statute, however, did not anticipate two important developments that substantially retarded the rate at which the Guidelines went into use.[144] First, the Act did not envision that, while the Guidelines technically became law in November 1987, constitutional challenges would prevent consistent nationwide application until January 1989.[145] Second, when Congress established the effective date for the Act, it contemplated that the Guidelines would apply to all sentencing proceedings occurring on the date after the Guidelines took effect, but not to cases already in progress.[146] The second problem developed after the Commission reviewed the considerable legal problems stemming from the implementation of mandatory Guidelines in conjunction with the abolishment of parole and "good time"[147] credits.[148] The Department of Justice and the Commission advised Congress that a clear "bright line" rule was preferable to

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desserts" and crime control philosophies because both camps recognize the wisdom of looking to those distinctions that judges and legislators have made over time. *See id.* These are distinctions that the judicial community believes to be important from either a crime-control or moral perspective. *See id.*

139. See *supra* note 112 and accompanying text for a discussion of the Commission's goals; *see also* Houser, *supra* note 130, at 364.

140. See *supra* note 138 and accompanying text for a discussion of the empirical system.

141. *See* U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINE SYSTEM AND SHORT TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 1 (1991) [hereinafter SENTENCING GUIDELINES REPORT].

142. *See id.* Congress was interested in evaluating the repercussions the Guidelines had on the justice system to ensure justice and fairness were best being served. *See id.*

143. *See id.*

144. *See id.*

145. *See id.* The Supreme Court held that the Guidelines are constitutional in *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

146. *See* SENTENCING GUIDELINES REPORT, *supra* note 141, at 1.

147. Good time credit is "awarded for good conduct and reduces [the] period of sentence which [the] prisoner must spend in prison although it does not reduce the period of the sentence itself." BLACK'S LAW DICTIONARY 694 (6th ed. 1990).

148. *See* SENTENCING GUIDELINES REPORT, *supra* note 141, at 1.

the vague language that stated that the new Act and the Guidelines would apply only to offenses committed after the November 1, 1987 effective date.[149] Consequently, in the Sentencing Act of 1987, Congress recognized and attempted to rectify the potential problem by "creating a more gradual, phased-in implementation scheme pursuant to which the guidelines are applied to post-effective date offenses as they are processed through the criminal justice system."[150]

Although the statutory purpose of the Guidelines as stated in the statutory text provides some insight into the impact the Guidelines have on sentencing, it is important to explore the purpose of the Guidelines and Congress' objective in creating them.

b. Congressional intent

Prior to the Guidelines' enactment, hearings before the Subcommittee on Criminal Justice indicated various sentencing disparities and inconsistencies. For instance, "the region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one is sentenced in Central California."[151] During the hearings, Congress also discovered that gender and race contributed to sentencing disparities. For instance, female bank robbers were likely to serve six months less than their similarly situated male counterparts, and African American bank robbers convicted in the South were likely to serve approximately thirteen months longer than similarly situated African American bank robbers convicted in other regions.[152]

The objective of the Guidelines "is to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentencing when warranted by mitigating or aggravating factors not taken into account in the guidelines."[153] As a result, the ability of the criminal justice system to treat all defendants equally is enhanced by the

149. *See id.*

150. *Id.*

151. Breyer, *supra* note 113, at 5 (quoting Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice on Sentencing Guidelines of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 676-77 (1987) (testimony of Ilene H. Nagel, U.S. Sentencing Commissioner)).

152. *See id.*

153. 52 Fed. Reg. 3920 (1987).

Guidelines.[154]

To enhance the ability of the criminal justice system to treat all defendants equally, Congress sought (1) honesty in sentencing through the elimination of the parole system; (2) reasonable uniformity in sentencing by eliminating the wide disparity of sentences for similarly situated offenders; and (3) proportionality in sentencing through appropriately different sentences for criminal conduct of differing severity.[155] Congress also hoped to move toward "a process of accountability, greater uniformity, and articulated reasons for punishment."[156]

Recognizing that the proscribed numerical calculations for sentencing mandated by the Guidelines would not encompass all of the factors relevant to sentencing, Congress created a small number of "departure exceptions" to restore some level of subjectivity to sentencing for appropriate cases.[157] Specifically, Congress determined that one way of satisfying the goal of maintaining flexibility would be to allow a sentence reduction if the defendant assisted in the prosecution of other criminals.[158]

2. Departure Exception: Section 5K1.1 Substantial Assistance

Departure exceptions permit judges to depart from prescribed Guideline ranges in two situations: (1) where the prosecutor moves for downward departure on the basis of substantial assistance;[159] or (2) when there is an aggravating or mitigating circumstance that the Commission did not adequately take into consideration in formulating the Guidelines.[160] The court has no power to deviate from the

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154. See Schweickert, *supra* note 110 and accompanying text for a discussion of the fairness and equality policies.

155. *See* 52 Fed. Reg. at 3922; *see also* Houser, *supra* note 130, at 363-65 (examining the interplay between the goals of the Guidelines and their application).

156. *See* William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 181 (1988).

157. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 5K (1998). Most departures in § 5K are provisions that allow a sentencing judge to *increase* a sentence beyond the statutory maximum. *See id.* Some examples of departures include section 5K2.1, which allows a judge to increase a sentence if death resulted from the defendant's act; § 5K2.4 which allows for an increase if a hostage was taken or an abduction took place; and § 5K2.8 which allows for an increase if the defendant's conduct was "unusually heinous, cruel, brutal, or degrading to the victim." *Id.*

158. *See id.* § 5K1.1.

159. *See id.*

160. *See id.* § 5K2.0; *see also* United States v. Doe, 870 F.Supp. 702, 706 (E.D. Va. 1994) (finding that the primary purpose of the departures is "to increase the percentage

Guidelines unless extraordinary circumstances exist.[161]

The Guidelines have significantly restricted the discretion enjoyed by present day sentencing judges in comparison to the free reign judges enjoyed prior to the Guidelines.[162] Consequently, the court's restricted sentencing power dramatically increases the power of the prosecutor.[163] Specifically, section 5K1.1 gives the prosecutor the power to decide whether a defendant may receive potential leniency in recognition of his or her substantial assistance.[164] Although assistance from the defendant can result in a sentence reduction, a non-sequitur defendant's refusal to assist the prosecutor in the investigation of other persons may not be considered an aggravating sentencing factor.[165]

"Federal prosecutors have a particularly wide range of [prosecutorial] choices [because] . . . [m]ost federal offenses also constitute state offenses."[166] Thus, prosecutors have enormous discretion in the pre-trial phase of litigation. Additionally, even if only federal charges are filed, federal statutes permit the prosecutor to choose to prosecute the defendant under a variety of different charges because of unsystematic and overlapping provisions.[167] As a result, a defendant who commits one crime involving many variables (such as a crime involving narcotics, the use of a firearm, and

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of criminals who are successfully prosecuted for their crimes," and not to reward criminals for wrongdoing).

161. *See* United States v. Higgins, 967 F.2d 841, 845-46 (3d Cir. 1992) (stating that the government's motion is an unequivocal condition precedent to a downward departure for defendant's cooperation); United States v. Amparo, 961 F.2d 288, 293-94 (1st Cir. 1992) (same); United States v. Willis, 956 F.2d 248, 251 (11th Cir. 1992) (same).

162. *See* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 485 (1998) ("The Guidelines replaced what was largely unguided trial court discretion in imposing criminal sentences with calibrated guidelines that significantly restricted trial court discretion.").

163. *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991) (discussing the prosecutor's powers). The sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors. *See id.* See *infra* Part I.B.3 for further discussion of prosecutorial discretion.

164. *See* Lee, *supra* note 4, at 109 (stating that "[s]ince prosecutors historically have been granted broad discretion in charging and bargaining, one might reasonably question what harm exists in granting prosecutors a little more discretion in this limited area of sentencing").

165. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.2 (1998) (stating that refusal to assist the prosecutor can not adversely effect the sentence the defendant ultimately receives).

166. David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 892 (1996).

167. *See id.* at 892-94 (stating that the current discretion possessed by the prosecutor causes "chaos" and reduces the overall predictability of sentencing).

money in excess of $500) may be subject to ten different federal charges, of which the prosecutor may decide which charges, if any, the defendant will face at trial.

In 1994, substantial assistance departures constituted over seventy percent of all departures from the Guidelines.[168] The substantial assistance departure exception states that "[u]pon motion of the Government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."[169] The plain meaning of this clause provides that absent a motion by the prosecutor, the court and the defendant do not have the power to file this motion independently.[170] An examination of the legislative history also reveals that in 1989, Congress substituted the word "provided" for "made a good faith effort to provide."[171] The purpose of the amendment was to clarify the Commission's intent that these departures were strictly for substantial assistance, and not just a defendant's willingness to provide assistance.[172] Although the intent of Congress may have been to ensure that the defendant provides actual assistance, studies have shown that in practice the defendant need not provide actual assistance if the prosecutor feels that the defendant is "deserving" of leniency.[173]

The substantial assistance departure serves two purposes: (1) the provision permits "*ex post facto* tailoring of defendants' sentences to reflect meaningful assistance rendered" by defendants and (2) "it provides defendants, *ex ante*, with an incentive to cooperate in the administration of justice."[174]

Prosecutors have always had the discretion to decide what cases to investigate, when to grant immunity, when to plea bargain,

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168. *See* U.S. SENTENCING COMM'N ANN. REP. 83 (1994).

169. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998).

170. See *supra* notes 5 & 11 and accompanying text for a discussion of the courts' inability to depart from the Guidelines absent a motion from the government.

171. U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 290, at 672 (1998-99); *see also* Lee, *supra* note 4, at 111 n.16.

172. *See* Lee, *supra* note 4, at 111 n.16.

173. *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 531 (1992). "Because of the flexibility introduced by permitting a 5K1.1 motion for effort regardless of effect, this particular policy can be used to reward sympathetic defendants who have not provided truly substantial help." *Id.* "Furthermore, probation officers report that they sometimes learn . . . that a defendant benefiting from a section 5K1.1 motion has not really done anything to assist the government." *Id.*

174. United States v. Mariano, 983 F.2d 1150, 1155 (1st Cir. 1993).

and what recommendation to make under the Guidelines.[175] Prosecutors also have the discretion to decide what, when, and where the filing of charges will take place.[176] The Guidelines, however, have had the effect of bestowing the prosecutor with an additional power that directly affects the sentencing of the defendant.[177] This power exists because only the prosecutor has the ability to file a substantial assistance motion, thus allowing the judge to deviate from the harsh Guideline sentencing.[178] In essence, the prosecutor acts in two capacities: as a prosecutor and as a sentencing judge.

Although Congress attempted to limit sentencing discretion by creating the Guidelines, it appears that in reality Congress has shifted the discretion away from the judiciary into the hands of the government.[179] Thus, prosecutorial discretion plays an important role in understanding the use of plea bargains and, ultimately, substantial assistance motions.

3. Prosecutorial Discretion

Prosecutorial discretion can be beneficial to both a defendant who is attempting to receive a lighter sentence via a substantial assistance motion and to the prosecutor who is trying to secure a conviction.[180] Although the creation of the Guidelines has in-

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175. *See* Fisher, *supra* note 99, at 749.

176. *See id.*

177. *See* Lee, *supra* note 4, at 108 (describing that only the prosecutor has the power to decide whether a defendant may receive leniency).

178. *See* Hon. Patti Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1052 (1997) (stating that "[w]ithout a government motion, a court cannot depart downwards below the guidelines range based on a defendant's substantial cooperation under section 5K1.1 'despite meanspiritedness or even arbitrariness on the government's part'") (quoting Wade v. United States, 504 U.S. 181, 185-86 (1992)).

179. *See* Fisher, *supra* note 99, at 749.

180. *See* Guidorizzi, *supra* note 36, at 761-62 (stating that justifications for plea bargaining include the great benefits provided to both the state and the defendant, as well as its potential for encouraging rehabilitation and efficiency). *But see* Saris, *supra* note 178. After examining the pros and cons of substantial assistance motions, Judge Saris stated the following:

> In short, downward departures based on substantial assistance motions are an invitation to unwarranted, secret sentencing disparity. There is no judicial review of the government's decision whether to file a substantial assistance motion, and as a practical matter, a sentencing court has unfettered discretion in determining the extent of downward departures.
>
> With respect to cooperating individuals, there is little assurance that a drug trafficker in New Hampshire will receive the same sentence as one in Rhode Island, or that even among cooperating defendants who are similarly situated and cooperate in similar ways, that the sentences will be uniform. . . .

creased prosecutorial power, this discretion is not completely unfettered.[181] For example, the decision to file a downward departure motion, as with other methods of enforcing criminal laws,[182] cannot be based on racial prejudices.

While prosecutors do not have unfettered discretion, judges will, as rule of thumb, defer to a prosecutor's decisions to initiate and conduct criminal prosecutions.[183] The basis for this deference is that courts acknowledge that the numerous complex decisions prosecutors must make are ill-suited for judicial review.[184] Therefore, there is a rebuttable presumption that prosecutors undertake prosecutions in good faith and in a nondiscriminatory manner.[185]

There have been many constitutional challenges to the Guidelines, and more specifically to the requirement that the prosecutor file a substantial assistance motion prior to a sentence reduction, but none of these challenges have been successful.[186] The Supreme

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Id. at 1049.

181. See Fisher, *supra* note 99, at 748-53 for a discussion of prosecutorial discretion.

182. Selectivity in the enforcement of criminal laws is subject to constitutional constraints. *See* Wayte v. United States, 470 U.S. 598, 608 (1985); *see also* Fisher, *supra* note 99, at 750. There are two basic constitutional attacks: (1) vindictive prosecution (which violates a defendant's due process rights) and (2) selective or discriminatory prosecution (which denies a defendant equal protection of the laws). *See id.* For example, a prosecutor cannot selectively prosecute based on racial prejudices. *See Wayte*, 470 U.S. at 608. Likewise, a prosecutor cannot refuse to file a substantial assistance motion based on the defendant's race or religion. *See* Wade v. United States, 504 U.S. 181, 185-86 (1992).

183. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (stating that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion").

184. *See Wayte*, 470 U.S. at 607 (stating that "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake"); Smith v. United States, 375 F.2d 243, 248 (5th Cir. 1967) (stating that "prosecutorial discretion has long been recognized as sacrosanct"); *see also* Fisher, *supra* note 99, at 750 (stating that prosecutorial discretion involves various decisions that the judiciary is not equipped to review).

185. *See Smith*, 375 F.2d at 248; *see also* Fisher, *supra* note 99, at 750 & n.36.

186. *See generally* United States v. Spears, 965 F.2d 262, 280-81 (7th Cir. 1992) (stating that a provision requiring that the Government move for downward departure due to substantial assistance does not violate substantial due process); United States v. Smith, 953 F.2d 1060, 1064-65 (7th Cir. 1992) (finding that requiring cooperation prior to filing a motion for downward departure does not violate due process guarantees); United States v. Harrison, 918 F.2d 30, 33 (5th Cir. 1990) (stating that there is no constitutional right to a substantial assistance motion); United States v. Spees, 911 F.2d 126, 127 (8th Cir. 1990) (stating that the requirement that the government file a motion prior

Court has also held that when a prosecutor specifically agrees to act pursuant to a plea agreement, the prosecutor is bound to the exact terms of the agreement.[187] Thus, if a written plea agreement does not include a sole discretion clause, but rather states that in return for a guilty plea the prosecutor will file a substantial assistance motion upon the defendant's agreement to testify for the government, the prosecutor is bound to perform once the defendant provides testimony.[188] The decision to enter into a plea agreement with a promise to file a substantial assistance motion, however, rests completely with the discretion of the prosecution.[189]

The United States Supreme Court has not directly dealt with the balance between prosecutorial discretion and a defendant's right to have a substantial assistance motion filed.[190] However, the Court has broadly examined the extent of prosecutorial discretion in the context of prosecuting defendants.

In *Wayte v. United States*,[191] the government instituted a "passive enforcement" policy[192] in which the government prosecuted only persons who reported themselves to the government as having failed to register for the draft. The United States Attorney attempted to prosecute this defendant under a passive enforcement policy.[193] The defendant argued that "passive enforcement" is unconstitutional on equal protection grounds.[194]

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to imposition of downward departure does not violate separation of powers or due process); United States v. Levy, 904 F.2d 1026, 1035-36 (6th Cir. 1990) (finding that cooperation with the prosecutor does not violate the Eighth Amendment prohibition against cruel and unusual punishment); *see also* Mistretta v. United States, 488 U.S. 361, 371 (1989) (upholding the constitutionality of the Guidelines).

187. *See* Santobello v. New York, 404 U.S. 257, 262 (1971).

188. *Cf. id.* (stating that "circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled").

189. *See generally* Fisher, *supra* note 99, at 749.

190. *See generally* Wade v. United States, 504 U.S. 181 (1992). Although *Wade* dealt with a substantial assistance motion, there was no written plea agreement between the prosecutor and defendant. *See id.* at 183.

191. 470 U.S. 598 (1985). In *Wayte*, the defendant refused to register with the Selective Service and wrote letters to several government officials proclaiming his intent to continue to do so. *See id.* at 601.

192. *See id.*; *see also* United States v. Schmucker, 815 F.2d 413, 416 (6th Cir. 1987) (stating that under a passive enforcement policy, the "government selected for prosecution only those who reported themselves or were reported by others as having violated the registration requirement," and all others who remained silent or unreported were not sought out for prosecution).

193. *See Wayte*, 470 U.S. at 603.

194. *See id.* at 604 (moving for dismissal on the ground of selective prosecution).

The Court held that passive enforcement is permissible in some instances, noting that "although prosecutorial discretion is broad, it is not unfettered," and thus is ultimately subject to constitutional constraints.[195] The justices in *Wayte* disagreed on the appropriate standard for evaluating selective prosecution claims.[196] Justice Powell, writing for the majority, used a standard equal protection analysis.[197] In order to succeed on such a claim, the defendant must show that the policy used had a "discriminatory effect and was motivated by a discriminatory purpose."[198] By contrast, the dissent argued that in order to establish a prima facie case of selective prosecution on equal protection grounds, the defendant must show that (1) "he is a member of a recognizable, distinct class;" (2) "a disproportionate number of the class was selected for investigation and possible prosecution;" and (3) "this selection procedure was subject to abuse or was otherwise not neutral."[199]

Ultimately, although the justices disagreed as to the exact test to be applied to prosecutorial discretion, the Court recognized that prosecutors are given broad discretion regarding who to prosecute, and the Court concluded that prosecutorial discretion is not "unfettered."[200] Thus, while the Supreme Court did not specifically discuss plea agreements in *Wayte*, the Court made it clear that prosecutorial discretion is bound by constitutional limits.[201] However, two Supreme Court cases have directly discussed different aspects of plea agreements in other contexts.

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195. *Id.* at 608 (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979), in which the Court held that the decision to prosecute may not be "deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification") (internal quotations omitted).

196. Arguments against constitutionality were made on First Amendment grounds (using the O'Brien test), due process grounds, and equal protection standards. *See id.* at 608-14.

197. *See id.* at 608.

198. *Id.*

199. *Id.* at 626 (Marshall, J., dissenting) (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

200. *See id.* at 608. The Court recognized, however, that prosecutorial discretion should be limited in only certain circumstances because:

> Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All of these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Id. at 607-08.

201. *See id.* at 608.

4. Supreme Court Decisions Concerning Plea Agreements

The Supreme Court has not explicitly decided whether a court may review a prosecutor's refusal to file a downward departure motion when the plea agreement grants the government "sole discretion." In fact, the Court has rarely discussed plea agreements and prosecutorial discretion.[202] However, two Supreme Court cases, *Santobello v. New York*[203] and *Wade v. United States*,[204] provide distinct frameworks for considering prosecutorial reviewability and the use of contract principles.

a. Santobello v. New York

In *Santobello*, the Supreme Court held that when a prosecutor fails to abide by the specific terms of a plea agreement, the court may grant the defendant specific performance of the terms of the plea agreement.[205] In *Santobello*, the plea agreement obligated the prosecutor to not make any sentencing recommendation to the judge in return for Santobello's guilty plea.[206] When sentencing finally occurred, after a series of delays and counsel changes by both the prosecutor and the defendant, the new prosecutor recommended the maximum sentence to the sentencing judge.[207] The

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202. Although the plea is an integral part of the justice system, the United States Supreme Court has rarely discussed the issue in its holdings. *See, e.g.*, United States v. Hyde, 520 U.S. 670 (1997); Libretti v. United States, 516 U.S. 29 (1995); United States v. Mezzanatto, 513 U.S. 196 (1995); Williamson v. United States, 512 U.S. 594 (1994); Braxton v. United States, 500 U.S. 344 (1991); United States v. Broce, 488 U.S. 563 (1989).

203. 404 U.S. 257 (1971).

204. 504 U.S. 181 (1992).

205. *See Santobello*, 404 U.S. at 262-63. In *Santobello*, the defendant was indicted in New York on two felony gambling charges. *See id.* at 258. Petitioner entered a plea of not guilty on both counts. *See id.* After negotiations between the prosecutor and the defendant, the prosecutor permitted the defendant to plead guilty to a lesser included offense that carried a maximum sentence of one year. *See id.* According to the lower court:

> [Where] the defendant's plea of guilty was entirely voluntary and [was] intended in itself as a complete act and a final disposition of the charges against him, with the sentencing function to be exercised as matter of course following a performance of the prosecutor's promise.... There was no coercion or overreaching on the part of the prosecution . . . due process and the interests of justice will be fully served by a remand for resentence with the specific performance of the prosecutor's promise.

People v. Santobello, 39 A.D.2d 654, 655 (N.Y. App. Div. 1972).

206. *See Santobello*, 404 U.S. at 258.

207. *See id.* at 259. The prosecution listed variables such as Santobello's criminal record and his alleged links with organized crime to justify the recommendation. *See id.* Over vigorous objections, defense counsel was overruled. *See id.*

judge sentenced the petitioner to the maximum one year sentence as recommended.[208]

The defendant appealed to the Supreme Court, asking the Court to review the prosecutor's decision to deviate from the specific terms of the plea agreement.[209] On review, Santobello argued that since he had fulfilled his part of the bargain by pleading guilty, and the prosecutor failed to fulfill his promise not to make a sentencing recommendation, he should be allowed to withdraw his guilty plea.[210] The Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[211] In reaching its decision, the Court acknowledged that plea agreements are important in the administration of justice both at the state and federal level and serve an important role in the disposition of most cases.[212] Justice Douglas, in concurrence, stated that if the parties enter into a plea agreement, and one party reneges on the agreement, the plea is void because courts must promote "an outraged sense of fairness."[213] In support of this conclusion, Justice Marshall, concurring in part and dissenting in part, stated that when a prosecutor breaks an agreed upon element of the bargain, he undercuts the basis for the waiver of the defendant's constitutional rights implicit in the plea.[214]

The Supreme Court's use of contract terminology in *Santobello* has led some circuit courts to apply basic contract principles when

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208. *See id.* at 260. Pending appeal, the defendant sought and obtained bail after the judge imposed the maximum sentence of one year. *See id.* The New York Supreme Court, Appellate Division, First Department, unanimously affirmed the petitioner's conviction and denied leave to appeal to the New York Court of Appeals. *See id.* The petitioner then sought and obtained certiorari to the United States Supreme Court. *See id.*

209. *See id.*

210. *See id.* at 263.

211. *Id.* at 262.

212. *See id.* at 260-61. "The disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice." *Id.* at 260. According to the Court, the number of defendants far exceeds judicial capacity. *See id.*

213. Justice Douglas stated that the Court should set up a new constitutional rule when a plea bargain is not kept by the prosecutor. *See id.* at 267 (Douglas, J., concurring). When the plea bargain is breached, the sentence should be vacated, and the state court must decide whether to order (a) specific performance of the original plea bargain or (b) a new trial on the original charges. *See id.* (Douglas, J., concurring).

214. Justice Marshall believed that the prosecutor's breach of the plea agreement was enough evidence to permit the defendant to withdraw his guilty plea and have a new trial ordered. *See id.* at 267-69 (Marshall, J., concurring in part and dissenting in part).

reviewing the government's refusal to file a substantial assistance motion pursuant to a plea agreement.[215] These circuits have held that if the prosecutor breached a plea agreement with the defendant, the court is then empowered to grant specific performance or permit withdrawal of the defendant's guilty plea.[216] In contrast, the remaining circuits have held that the holding in *Santobello* only applies to plea agreements in which the prosecutor expressly agrees to do something, and therefore *Santobello* is not applicable to "sole discretion" plea agreements in which the prosecutor expressly reserves the right to independently consider the value of the assistance given by the defendant.[217] These courts hold that only when defendants plead guilty in return for government concessions are the defendants legally entitled to the agreed upon concession.[218]

While *Santobello* addressed the enforceability of plea agreements that do not contain sole discretion language, the Supreme Court did not address the issue of substantial assistance until *Wade v. United States*.[219] Specifically, *Wade* addressed whether, in the absence of a plea agreement, a defendant may challenge a prosecutor's refusal to file a substantial assistance motion.[220]

b. Wade v. United States

In *Wade*,[221] the Supreme Court held that the prosecutor is empowered to file a substantial assistance motion,[222] and the court

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215. *See, e.g.,* United States v. Isaac, 141 F.3d 477, 481-82 (3d Cir. 1998); United States v. Imtiaz, 81 F.3d 262 (2d Cir. 1996); United States v. Jones, 58 F.3d 688, 691 (D.C. Cir 1995); United States v. Kahn, 920 F.2d 1100, 1105 (2d Cir. 1990); *see also* Gyurci, *supra* note 13, at 1268-70 (discussing the application of contract principles to plea bargains).

216. *See, e.g.*, United States v. Burrell, 963 F.2d 976, 985 (7th Cir. 1992); United States v. Smith, 953 F.2d 1060, 1066 (7th Cir. 1992); *see also*, Gyurci, *supra* note 13, at 1269 & n.82 (citing *Santobello*, 404 U.S. at 267 (Douglas, J., concurring)).

217. See *infra* Part II.A for a discussion of the circuits that have held that there is no power to review a prosecutor's decision not to file a 5K1.1 motion.

218. *See* Scott & Stuntz, *supra* note 44, at 1953.

219. 504 U.S. 181 (1992).

220. *See id.* at 183-86.

221. In *Wade*, the police arrested the defendant on federal drug charges, to which he plead guilty. *See id.* at 183. Prior to sentencing, the defendant offered law enforcement officials information that led to the arrest of another dealer. *See id.* The defendant offered this information without any written plea agreement. *See id.* The judge sentenced the defendant to the Guidelines' ten-year statutory minimum sentence. *See id.* The defendant requested that the court reduce the sentence below the minimum standard to reward him for his substantial assistance to the government. *See id.* The court denied the defendant's request. *See id.*

222. See *supra* note 3 and accompanying text for a discussion of substantial assistance.

may review the prosecutor's refusal to file the motion only in situations where an unconstitutional motive prompted the prosecutor's decision.[223] Therefore, the Court held that the prosecutor's discretion to file a substantial assistance motion is subject only to constitutional limitations.[224] The defendant's dissatisfaction with the prosecutor's evaluation of the assistance is insufficient to trigger judicial review unless accompanied by unconstitutional motives.[225] Moreover, the Court emphasized that Congress gave the government the power to file a downward departure motion, and not a duty to do so.[226]

Although neither *Santobello* nor *Wade* directly address the issue of whether courts have the power to review a prosecutor's decision not to file a sole discretion substantial assistance motion, these cases provide the necessary background to understanding the current split among the circuits.

II. The Circuit Split: To Review or Not to Review

The current split in the United States Courts of Appeals concerning the reviewability of a prosecutor's decision to file a sole discretion substantial assistance motion has centered on the applicability of *Wade* or *Santobello*, as well as other basic contract principles.[227] The Courts of Appeals have reached different conclusions regarding the nature of the plea agreement itself.[228] Specifically, the courts must decide whether sole discretion substantial assistance plea agreements are tools by which prosecutors may exercise complete discretion, or whether plea agreements constitute contracts that courts may review using basic contract principles. The

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223. *See Wade*, 504 U.S. at 185-86 ("[W]e see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions . . . [and] we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive.").

224. *See id.* at 186. "Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion." *Id.*

225. *See id.* A mere claim that a defendant provided substantial assistance is not enough to trigger a judicial review. *See id.* Generalized allegations of improper motive are also not enough. *See id.* A defendant has "no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing'" of prejudicial prosecutorial behavior. *Id.*

226. *See id.* at 185.

227. *See* Lee, *supra* note 4, at 168 (discussing the issue of prosecutorial discretion in general).

228. See *infra* Part II.A and II.B for a discussion of the circuit split.

non-reviewing circuits do not apply contract theory when reviewing a prosecutor's decision not to file a substantial assistance motion. In contrast, the reviewing circuits perform a contract-based review. The decisions of the non-reviewing circuits, comprised of the Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits,[229] form an overwhelming majority when compared to the circuits that allow courts to review a prosecutor's decision to not file a substantial assistance motion, which include the District of Columbia, Second, and Third Circuits.[230]

A. *Courts Do Not Have the Power to Review a Prosecutor's Refusal to File a Sole Discretion Substantial Assistance Motion*

The United States Courts of Appeals for the Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits (collectively referred to as the "non-reviewing circuits") have held that courts do not have jurisdiction to review a prosecutor's refusal to file a substantial assistance motion absent unconstitutional motivations.[231] The non-reviewing circuits hold that *Wade* directly applies to sole discretion plea agreement cases even though the defendant in *Wade* had no plea agreement. Therefore, these courts do not review prosecutorial discretion other than where decisions are based upon unconstitutional grounds.[232] As such, these circuits hold that courts do not have jurisdiction to review a prosecutor's decision not to file a 5K1.1 motion, even if a defendant alleges bad faith or improper

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229. See *infra* Part II.A for a thorough discussion of the circuits that do not review a prosecutor's refusal to file a substantial assistance motion.

230. See *infra* Part II.B for a thorough discussion of the circuits that allow courts to review a prosecutor's refusal to file a substantial assistance motion.

231. *See, e.g.*, United States v. Moses, No. 97-4321, 97-4193, 1998 WL 67795 (4th Cir. Feb. 20, 1998); United States v. Courtois, 131 F.3d 937 (10th Cir. 1997); United States v. Price, 95 F.3d 364 (5th Cir. 1996) (per curiam); United States v. Mote, No. 95-30372, 1996 WL 528437 (9th Cir. Sept. 19, 1996); United States v. Padilla, No. 95-1282, 1995 WL 590451 (8th Cir. 1995); United States v. Bagnoli, 7 F.3d 90 (6th Cir. 1993); United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993); United States v. Fairchild, 940 F.2d 261 (7th Cir. 1991).

232. *See Mote*, 1996 WL 528437, at *2 (stating that Mote failed to meet the substantial threshold requirement); *Price*, 95 F.3d at 367-68 (per curiam) (stating that according to *Wade*, "[a]bsent a motion for downward departure made by the Government, a sentencing court is without authority to grant a downward departure on the basis of substantial assistance under § 5K1.1") (citing Wade v. United States, 504 U.S. 181, 184 (1992)); *see also* United States v. Raynor, 939 F.2d 191, 195 (4th Cir. 1991) (stating that absent an agreement, the government alone has the right to decide whether or not to file the motion for downward departure).

motive.[233] For example, the Fifth Circuit has held that a defendant is not entitled "'to a remedy or even to discovery or an evidentiary hearing' unless the prosecution relied on an unconstitutional motive in refusing to file a 5K1.1 motion."[234]

In addition, these courts also hold that a defendant's claim that he provided substantial assistance does not entitle a defendant to judicial intervention.[235] Because the government has the ultimate discretion to file the motion, "a defendant's assertion of 'good faith' is irrelevant."[236] Specifically, "[n]othing a defendant does, up to and including a 'good faith' effort to assist the government, guarantees him a substantial assistance departure."[237]

The non-reviewing circuits recognize that the prosecution can bargain away its discretion by specifically stating what the defendant must do in order for the assistance to be considered substantial.[238] In essence, this type of agreement would remove

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233. *See Raynor*, 939 F.2d at 195 (stating that absent an agreement in which the government expressly agrees to file a substantial assistance motion, the defendant has no right to question the government's motives when the government fails to file the motion) (citing United States v. Wade, 936 F.2d 169, 172 (4th Cir. 1991), *aff'd*, 504 U.S. 181 (1992)).

234. *See* United States v. Garcia-Bonilla, 11 F.3d 45, 46 (5th Cir. 1993) (citing *Wade*, 504 U.S. at 186); *accord Price*, 95 F.3d at 367-68 ("5K1.1 does not require the government to move for a downward departure if the defendant provides substantial assistance, but rather grants the government discretionary power to make such a motion") (quoting *Garcia-Bonilla*, 11 F.3d at 46); United States v. Aderholt, 87 F.3d 740, 743-44 (5th Cir. 1996) (stating that the court denied the plaintiff's request for a review of the prosecutor's decision not to file a substantial assistance motion since there was no allegation of unconstitutionality); United States v. Underwood, 61 F.3d 306, 312 (5th Cir. 1995) (stating that the government did not bargain away its discretion, therefore the plaintiff's issue was without merit).

235. *See* United States v. Sims, No. 95-5116, 1992 WL 190909, at *2 (4th Cir. Aug. 11, 1992) (unpublished opinion) (finding that the district court can only inquire into the government's decision not to file a section 5K1.1 motion if the defendant can make a "substantial showing" that the refusal was unconstitutional) (citing *Wade*, 504 U.S. at 186); *see also Price*, 95 F.3d at 368-69 (stating that a refusal to file a substantial assistance motion is only reviewable for unconstitutional motives).

236. *Fairchild*, 940 F.2d at 266. Likewise, the court has rejected the notion that the court can order departure under 5K1.1 if the prosecutor failed to make the motion in "bad faith." *See* United States v. Burrell, 963 F.2d 976, 985 (7th Cir. 1992).

237. *Fairchild*, 940 F.2d at 266. *See generally Burrell*, 963 F.2d at 985. In *Burrell*, the defendant challenged the plea agreement's sole discretion clause because he felt that he had divulged "substantial" information by helping the government obtain a guilty plea against his accomplice. *See id.* at 984. Because the defendant never argued that the denial was based on unconstitutional grounds, the court determined that it had no power to review the prosecutor's decision not to file the motion, regardless of the extent of the actual assistance. *See id.* at 985. According to the court, there is no review for arbitrariness or bad faith. *See id.*

238. *See* United States v. Dixon, 998 F.2d 228, 230 (4th Cir. 1993) ("'[W]hen a

prosecutorial discretion and objectify the relationship between the prosecutor and the defendant. Once a prosecutor does this, and the defendant offers the specified objective "substantial assistance," the prosecutor must file the 5K1.1 motion regardless of the prosecutor's overall dissatisfaction with the defendant's assistance.[239] Thus, the non-reviewing circuits have recognized that when a defendant negotiates a plea agreement that includes the government's agreement to file a motion for downward departure under section 5K1.1, the defendant obtains the right to require the government to fulfill its promise.[240] However, absent an agreement to do so, the government has the right to decide, in its sole discretion, whether to file a motion for downward departure based upon the government's subjective impression of the defendant's substantial assistance.[241]

Specifically, a violation of the terms of a plea agreement is a "question of law that is reviewed de novo" and the defendant has the burden of proving by a preponderance of the evidence that the underlying facts establish a breach of the plea agreement.[242] In de-

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plea rests in any significant degree on a promise . . . such promise must be fulfilled.'") (quoting Santobello v. New York, 404 U.S. 257, 262 (1971)); *cf.* United States v. Courtois, 131 F.3d 937 (10th Cir. 1997). The Court of Appeals for the Tenth Circuit has stated that the specific language of the agreement is the determinative factor as to whether the government has bargained away their discretion. *See id.* at 937. Where the prosecutor reserves sole discretion to decide whether or not to file a substantial assistance motion, the language of the agreement does not obligate the government to file a § 5K1.1 motion. *See id.* at 939. Therefore, "[e]ven if the defendant undeniably renders substantial assistance, the government retains discretion to decide whether to request a § 5K1.1 downward departure." *Id.* at 938.

239. *See Courtois*, 131 F.3d at 938-39.

240. *See* United States v. Raynor, 939 F.2d 191, 195 (4th Cir. 1991) (stating that "when a defendant is able to negotiate a plea agreement that includes the government's agreement to file a motion for downward departure . . . the defendant obtains rights to require the government to fulfill its promise") (citing United States v. Wade, 936 F.2d 169, 173 (4th Cir. 1991)); *see also Courtois*, 131 F.3d at 938-39 (same); *Price*, 95 F.3d at 368 (same); United States v. Aderholt, 87 F.3d 740, 743 (5th Cir. 1996) (same).

241. *See Courtois*, 131 F.3d at 938 (stating that the government always retains discretion to determine whether to file a 5K1.1 motion). The non-reviewing courts seem to imply that a defendant who enters into a sole discretion substantial assistance plea agreement does so at the risk of prosecutorial dissatisfaction and with no judicial remedy. *See Raynor*, 939 F.2d at 195.

242. *See Price*, 95 F.3d at 367; United States v. Garcia-Bonilla, 11 F.3d 45, 46 (5th Cir. 1993). In *Garcia-Bonilla*, the plea agreement provided:

> The United States reserves its option to seek any departure from the applicable sentencing guidelines, pursuant to Section 5K of the *Sentencing Guidelines and Policy Statements*, or Rule 35(b) of the Federal Rules Criminal Procedure [sic], if in its discretion, it is determined that such a departure is appropriate. The defendant agrees that the decision whether to file such a motion rests within the sole discretion of the United States.

Id.

termining whether the government has violated a plea agreement, the court must first determine whether "the government's conduct is consistent with the parties' reasonable understanding of the agreement."[243] Thus, where both parties understood that the prosecutor would use its sole discretion to determine whether or not to file a substantial assistance motion, the defendant may not question the government's decision not to file.[244] In such a situation, the "defendant is not entitled to a hearing" under *Wade* unless the refusal to file the 5K1.1 motion was based on an unconstitutional motive.[245]

Second, the court must examine the specific language of the plea agreement, because the question of whether or not the prosecutor retained his or her discretion to file a substantial assistance motion turns upon the specific language in the agreement. The non-reviewing circuits have held that the prosecutor has only bargained away his or her discretion if the plea agreement expressly states that the prosecutor has done so.[246] Moreover, the prosecutor retains the sole discretion to determine if he or she will file a substantial assistance motion, notwithstanding the fact that an agreement does not include an objective definition of sole discretion.[247]

Taking a slightly different approach, the Ninth Circuit has acknowledged that plea agreements are contractual in nature,[248] and

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243. *See Garcia-Bonilla*, 11 F.3d at 46 (quoting United States v. Valencia, 985 F.2d 758, 761 (5th Cir. 1993)); *see also* United States v. De la Fuente, 8 F.3d 1333, 1337 n.7 (9th Cir. 1993). In *De la Fuente*, the court stated:

> [A]s a practical matter, because we employ *objective* standards—it is the parties' or defendant's *reasonable* beliefs that control—the difference between stating that the defendant's or the parties' beliefs control is minimal. The construction we adopt, however, incorporates the general rule that ambiguities are construed in favor of the defendant.

Id.

244. *See Garcia-Bonilla*, 11 F.3d at 47.

245. *See* United States v. Bagnoli, 7 F.3d 90, 92 (6th Cir. 1993) (discussing *Wade's* holding that a court only has the authority "to review the Government's failure to move for a downward departure . . . if the court finds that the refusal was based on an unconstitutional motive").

246. *See Price*, 95 F.3d at 369 (finding that "the government may bargain away its discretion under the terms of a plea agreement, and thereby obligate itself to move for a downward departure in exchange for the defendant's substantial assistance"); United States v. Aderholt, 87 F.3d 740, 742 (5th Cir. 1996); *Garcia-Bonilla*, 11 F.3d at 46-47.

247. *See* United States v. Wallace, 22 F.3d 84, 87 (4th Cir. 1999). If the prosecutor reserves the sole discretion to decide whether or not to file a motion, the court cannot review the prosecutor's decision not to do so absent some evidence of unconstitutional motives. *See id.* Therefore, implicit in the term sole discretion is unreviewability.

248. *See* United States v. Keller, 902 F.2d 1391, 1393 (9th Cir. 1990) (stating that "[p]lea agreements are contractual in nature and are measured by contract law stan-

has held that the court may consider what the defendant reasonably understood when he entered into the plea agreement.[249] However, the court has yet to make such a holding in the context of a substantial assistance plea agreement. Notwithstanding the defendant's expectations, the courts have ultimately held that the government's sole discretion usually prevails.[250] Some circuits, choosing not to follow the non-reviewing circuits, have held that fairness requires that prosecutorial discretion be reviewed by the court in certain circumstances.[251]

B. *Courts Do Have the Power to Review a Prosecutor's Refusal to File a Substantial Assistance Motion*

The dissent in *United States v. Forney*,[252] which strongly protested the majority opinion shared by the circuit courts that disallow review of prosecutorial discretion, best sums up the reasoning behind allowing reviewability:

> The majority holds that regardless of the extent of [the defendant's] cooperation, the government is obligated to do *absolutely* nothing. This result is inconsistent with Supreme Court precedents governing plea agreements, with principles of contract law, and with fundamental fairness. The government promised to *consider* filing a 5K1.1 motion; it must be required to act in good faith in fulfilling this promise. As with any other promise in a plea agreement, the district court must ensure that this promise is fulfilled.[253]

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dards," yet are not reviewable under contract law theory); *see also* United States v. Mote, No. 95-30372, 1996 WL 528437, at *1 (9th Cir. Sept. 13, 1996) (unpublished decision); United States v. Floyd, 1 F.3d 867, 870 (9th Cir. 1993).

249. *See* United States v. De la Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993) ("In construing an agreement, the court must determine what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty.") (citing United States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992), *amended by*, 990 F.2d 1163 (9th Cir. 1993)).

250. *See Mote*, 1996 WL 528437, at *1. The plea agreement included the following language: "the government alone will determine [if] it will apply for any additional offense level reduction under U.S.S.G. § 5K1.1 or FED. R. CIV. P. 35 in return for your client's full and truthful cooperation." *Id.* "The [prosecutor] did not breach the plea agreement because the parties stipulated . . . that the decision to file a motion for a substantial assistance departure was solely within the government's discretion." *Id.* Because the agreement was clear and unambiguous, no breach occurred. *See id.*; *see also* United States v. Ajugwo, 82 F.3d 925, 928-29 (9th Cir. 1996).

251. See *infra* Part II.B for a thorough discussion of the circuits that allow courts to review a prosecutor's refusal to file a substantial assistance motion.

252. 9 F.3d 1492 (11th Cir. 1993).

253. *Id.* at 1504 (Clarke, J., dissenting).

According to the dissent, a district court judge is not only authorized to examine the prosecutor's discretion based on contract principles, but is obligated to do so in order to ensure fairness.[254] Following this basic premise, a number of circuits have concluded that plea agreements include the same elements as contracts,[255] and therefore, a prosecutor's decision not to file a substantial assistance motion is reviewable using the basic contract principle of good faith.[256]

For example, the United States District Court for the District of Columbia has held that a district court may examine a plea agreement to ensure that the defendant and the prosecutor have fulfilled all previously agreed upon contingent obligations.[257] In addition, even where a plea agreement does not guarantee that the government will file a 5K1.1 motion, all plea agreements include an implied obligation of good faith and fair dealing, as well as an obligation that the government make an honest and informed decision.[258]

Reviewing circuits have also criticized plea bargaining agreements that contain sole discretion clauses as a whole.[259] For example, the District of Columbia Circuit criticized plea agreements as granting United States Attorneys "extraordinary power" since only the government can act by filing a 5K1.1 motion prior to any type of

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254. *See id.* (Clarke, J., dissenting).

255. See *infra* note 304 and accompanying text for the definition of a contract.

256. *See, e.g.,* United States v. Isaac, 141 F.3d 477, 483 (3d Cir. 1998); United States v. Jones, 58 F.3d 688, 692 (D.C. Cir. 1995); United States v. Profeta, No. 91-3224, 1993 WL 185730, at *1 (D.C. Cir. May 20, 1993) (unpublished opinion); United States v. Knights, 968 F.2d 1483, 1486 (2d Cir. 1992); United States v. Kahn, 920 F.2d 1100, 1105 (2d Cir. 1990); United States v. Rexach, 896 F.2d 710, 714 (2d Cir. 1990).

257. *See* United States v. Sparks, 20 F.3d 476, 478 (D.C. Cir. 1994) (stating that "[t]he only government obligation is a contingent one: 'if the Departure Guideline Committee . . . determines that [the defendant] has provided substantial assistance . . ., then this Office will file a motion pursuant to 18 U.S.C. § 3553(e), and 5K1.1.' If the contingency is not fulfilled, the departure motion is not filed. Period."); *see also Jones*, 58 F.3d at 689. In *Jones*, the United States Attorney indicted a United States postal employee on one count of theft of mail and one count of forgery. *See id.* at 689-90. The appellant entered into a plea agreement that gave the prosecution the discretion to file a 5K1.1 motion upon a finding that the defendant substantially assisted in the prosecution of another. *See id.* at 690. When the government did not file a section 5K1.1, the appellant moved the court to compel the government to file the motion. *See id.* The district court ultimately held that the language of the agreement "created only a contingent obligation," and thus, the government had no obligation to file the motion. *Id.* at 691.

258. *See Jones*, 58 F.3d at 692.

259. *See id.* at 691 ("Although we are satisfied that the Government fulfilled its obligations under the plea agreement, [certain] aspects of the case trouble us.").

sentencing departure.[260] This power could result in the prosecutor using the 5K1.1 motion as an improper tool of persuasion: "[P]rosecutors might dangle the suggestion of a section 5K1.1 motion in front of defendants to lure them into plea agreements, all the while knowing that defendant's cooperation could not possibly constitute assistance valuable enough [to be considered] 'substantial.'"[261]

The Second Circuit has recognized that where there is a cooperation agreement that provides for a downward departure motion, and that agreement incorporates substantial assistance language, the discretion of the prosecutor is generally the sole determinant when evaluating the quantity of useful information.[262] However, the court further recognized that although "criminal sentencing proceedings are not the same as civil contract disputes,"[263] courts may nonetheless interpret plea agreements with principles borrowed from the law of contracts.[264] Accordingly, as in contracts, there is an implied obligation of good faith and fair dealing in every plea agreement.[265] "Consequently, the prosecution's determination that it is dissatisfied with the defendant's performance under the cooperation agreement—as with other areas of prosecutorial discretion—may not be reached dishonestly or in bad faith."[266]

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260. *See id.* The court recognized that the defendant's only chance of obtaining a sentence outside of the Guideline grid was through prosecutorial discretion.

261. *Id.* at 691-92; *cf.* United States v. Fairchild, 940 F.2d 261, 266 (7th Cir. 1991) (stating that the court was concerned that the government had failed to objectively define substantial assistance within the plea agreement).

262. *See* United States v. Kahn, 920 F.2d 1100, 1104 (2d Cir. 1990) (stating that "[w]ith such broad discretionary power, prosecutors would have little incentive to misuse cooperation agreements and renege on their promises to move for downward departures") (citing United States v. Rexach, 896 F.2d 710, 714 (2d Cir. 1990); United States v. Huerta, 878 F.2d 89, 93 (2d Cir. 1989)).

263. *Id.* at 1105 (citing Innes v. Dalsheim, 864 F.2d 974, 978 (2d Cir. 1988)).

264. *See id.* (citing United States v. Alexander, 869 F.2d 91, 95 (2d Cir. 1989); United States v. Carbone, 739 F.2d 45, 46 (2d. Cir. 1984)).

265. *See id.* (stating that "[i]n *every* contract there is an implied covenant of good faith and fair dealing which precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement") (citing Filner v. Shapiro, 633 F.2d 139, 143 (2d Cir. 1980) (emphasis added)). "Good faith is defined in Uniform Commercial Code § 1-201(19) as 'honesty in fact in the conduct or transaction concerned.'" RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979) (citation omitted). "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." *Id.*

266. *Kahn*, 920 F.2d at 1105 (finding that the prosecutor could not substitute a more serious charge at the new trial after defendant's successful appeal) (citing Blackledge v. Perry, 417 U.S. 21, 28 (1974)); United States v. Berrios, 501 F.2d 1207,

The reviewing circuits have further stated that although the prosecutor reserves sole discretion, the sole discretion does not grant the court the power to disregard the Supreme Court's holding in *Santobello v. New York*.[267] For example, in *United States v. Certuche*,[268] responding to the defendant's motion to compel the government to file a 5K1.1 motion, the Second Circuit Court of Appeals held that courts must adhere to all agreements " 'unless the government's proffered explanation for withholding the section 5K1.1 motion is "wholly insufficient" or unless the defendant's version of events, supported by at least some evidence, contradicts the government's . . . .' "[269]

While the reviewing circuits have acknowledged that prosecutorial discretion is essential in the judicial system, they have concluded that it does not outweigh the importance of fairness to a defendant.[270] For example, in *United States v. Knights*,[271] the court stated that "[b]ecause the prosecution often is in the best position to evaluate the quality of a defendant's cooperation and to decide whether to make a substantial assistance motion, this decision, like other prosecutorial determinations, may be subjected to . . . limited review."[272] Thus, the *Knights* decision permits judicial review to ensure fairness to the defendant, although the review is somewhat limited.

When a cooperation agreement allows for a substantial assistance motion contingent on the government's subjective evaluation

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1211 (2d Cir. 1974) (finding that an allegation of intentional and purposeful discrimination leading to selective prosecution required further investigation).

267. 404 U.S. 257 (1971); *see, e.g.*, United States v. Isaac, 141 F.3d 477, 481 (3d Cir. 1998); United States v. Knights, 968 F.2d 1483, 1486 (2d Cir. 1992); *Kahn*, 920 F.2d at 1105.

268. No. 97-1327, 1998 WL 537778, at *2 (2d Cir. July 29, 1998) (unpublished decision). In *Certuche*, one of the defendants (Aguirre) entered into a section 5K1.1 sole discretion plea agreement after being charged with several narcotic violations. *See id.* The defendant then moved to compel a 5K1.1 filing after the government refused to do so. *See id.*

269. *Id.* (quoting United States v. Imitaz, 81 F.3d 262, 264 (2d Cir. 1996)).

270. *See Isaac*, 141 F.3d at 483 (stating that the defendant gives up his right to a "fair trial" when he signs a plea agreement and therefore should be afforded a "good faith" assistance evaluation by the prosecutor).

271. 968 F.2d 1483 (2d Cir. 1992). In *Knights*, the defendant pled guilty to drug offenses pursuant to a plea agreement. *See id.* at 1485. The plea agreement provided that the government would move for a substantial assistance motion if, in the government's sole and unfettered discretion, the defendant had met the government's expectations. *See id.*

272. *Id.* at 1487 (citing United States v. Rexach, 896 F.2d at 710, 713 (2d Cir. 1990)).

of a defendant's efforts to cooperate, the district court may review whether the prosecution based its decision on unconstitutional considerations, such as religion, race, or "'whether the prosecutor has made its determination in good faith.'"[273] Most of the reviewing circuits have stated that *Wade* is not authoritative because it is inapplicable to sole discretion plea agreement cases. This is due to the fact that the *Wade* Court did not deal with a written plea agreement. The reviewing circuits agree that plea agreements are a simple matter of contract law, once the court determines that there is a contractual relationship between the defendant and the government.[274] If the plea agreement contemplates a motion, a contractual relationship exists and the district court is free to apply contract principles to determine whether the provisions of the agreement are met.[275]

"When a defendant pleads guilty pursuant to a plea agreement, he gives up his rights to a fair trial, confrontation, and a potential acquittal by a jury; the government, in return, secures its conviction without effort or risk."[276] Thus, reviewing courts have stated that defendants reasonably expect the government to act in good faith, and therefore any claim to the contrary allows some level of examination by the district court.[277]

Those judges dissenting from the courts' ability to review

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273. *Id.* (quoting *Rexach*, 896 F.2d at 714).

274. *See* United States v. Padilla, 186 F.3d 136, 140 (2d Cir. 1999) (stating that "'[p]lea agreements are unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards [apply]'") (citation omitted); *see also* United States v. Ready, 82 F.3d 551 (2d Cir. 1996) (stating that courts may apply general fairness principles to invalidate particular terms of a plea agreement). In *United States v. Abuhouran*, 161 F.3d 206, 212 (3d Cir. 1998), the court noted that:

> [T]he government frequently will agree as part of a plea agreement to consider whether to offer a § 5K1.1 motion. In such a case, even if the government reserves "sole discretion" to determine whether to offer a motion, a district court has authority to depart downward for substantial assistance when the government's refusal to offer a motion is "attributable to bad faith." This exception derives from contract law .... [Contract law principles] apply because, without them, the defendant would be deprived of the benefit of his plea bargain and his plea would be involuntary.

Id. (citing *Isaac*, 141 F.3d at 483-84; Santobello v. New York, 404 U.S. 257, 262 (1971)).

275. *See Isaac*, 141 F.3d at 482 ("We treat[ ] the issue of compliance with the plea agreement as a straight-forward matter of contract law ....").

276. *Id.* at 483.

277. "When the agreement contains a [sole discretion] § 5K1.1 provision ... it is not the case that the clause regarding government discretion deprives the defendant of any reasonable expectation of receiving something in return for the surrender of his rights." *Id.* Defendants do not strike illusory bargains with the prosecutor simply because the prosecutor retained sole discretion. *See id.*

prosecutorial discretion have argued against review for fear of an overall breakdown in prosecutorial discretion and efficiency.[278] Understanding that prosecutorial discretion is necessary to successfully prosecute criminals, a fear of judicial review may hamper their ability to successfully prosecute. Notwithstanding the dissenters' opinions, and the holdings of the non-reviewing circuits, the benefits of applying contract theory to sole discretion substantial assistance plea agreements outweigh the drawbacks.

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278. In *Isaac*, the defendant entered into a plea agreement in which the government agreed to file a section 5K1.1 motion if "in its sole discretion," the government determined that the defendant had fulfilled his obligation of cooperation. *See id.* at 479. The court found that sole discretion did not give the prosecutor unfettered discretion, and thus his decision not to file the substantial assistance motion was reviewable by the judiciary. *See id.* at 481-84. The dissent agreed with the majority that *Santobello v. New York* provides the analytical framework for evaluating the terms of a plea agreement. *See id.* at 485 (Mansmann, J., dissenting). However, the dissent disagreed with the majority's decision to find that *Wade v. United States*, 504 U.S. 181 (1992), was inapplicable. *See id.* at 486-87 (Mansmann, J., dissenting). The dissent decided that extensive judicial supervision of prosecutorial discretion will prove detrimental to the criminal justice system and will have a chilling effect on prosecutorial effectiveness. *See id.* at 488 (Mansmann, J., dissenting) (discussing *Wade* and *Wayte v. United States*, 470 U.S. 598 (1985), generally). The dissent reasoned that congressional intent conferred prosecutorial discretion upon the government for the purpose of recommending a departure from the Sentencing Guidelines due to a defendant's substantial assistance. *See id.* at 489 (Mansmann, J., dissenting). Further, a prosecutor's refusal to file a section 5K1.1 motion should be evaluated like all other prosecutorial decisions, and therefore, should only be subject to judicial review if the defendant can make a substantial showing of an unconstitutional motive. *See id.* at 486 (Mansmann, J., dissenting). The fact that *Wade* did not involve a plea agreement was irrelevant because the underlying holding of the Supreme Court was that review of plea bargaining discretion is only permissible for unconstitutional motives, and not merely for an accusation that the defendant substantially assisted in their own opinion. *See id.* at 487 (Mansmann, J., dissenting). When a defendant and prosecutor enter into a sole discretion plea agreement, the parties' expectations are that the defendant is in effect bargaining away the right of anyone else to examine the government's discretion. *See id.* at 486 (Mansmann, J., dissenting) (stating that "'once the government uses its § 5K1.1 discretion as a bargaining chip in the plea negotiation process, that discretion is circumscribed by the terms of the agreement'") (quoting United States v. Connor, 930 F.2d 1073, 1075 (4th Cir. 1991)). Thus, even under the standards set forth in *Santobello*, the district court is not permitted to review a plea agreement if that plea agreement specifically bargained away the discretion of the court and the right of the defendant to question the reasoning of the government. *See id.* at 487-89 (Mansmann, J., dissenting). Rather, a plea agreement can only be examined if the government has expressly agreed to do something, and then failed to perform on that promise. *See id.* (Mansmann, J., dissenting). See *supra* Part II.A for a thorough discussion of other circuits that do not allow judicial review of a prosecutor's refusal to file a substantial assistance motion.

III. An Analysis of the Benefits and Drawbacks of Applying Contract Principles to Sole Discretion Substantial Assistance Motions

This analysis examines three issues related to viewing plea bargains as contracts. First, this section examines the applicability of *Wade* to written plea agreements, including an examination of judicial reviewability of prosecutorial discretion.[279] Second, this section examines sole discretion and the applicability of contract principles, including a discussion of the applicability of *Santobello* and four contract defenses which may apply to the enforceability of a plea agreement.[280] These defenses include invalidation arguments such as failure to bargain in good faith, duress, unconscionability, and the creation of an illusory promise.[281] Finally, this section proposes an alternative resolution to the current circuit split that may appease the courts on both sides and benefit both prosecutors and defendants.[282]

A. *Prosecutorial Discretion and Plea Agreements*

Prosecutorial discretion and plea agreements play an integral part in the administration of justice.[283] *Wade v. United States*[284] recognized this importance and refused to allow judicial intervention into prosecutorial discretion, absent specific unconstitutional motives.[285] The non-reviewing courts have embraced this reasoning and held that *Wade* applies even when the prosecutor and defendant have formed a plea agreement.

1. The Applicability of *Wade* to Written Plea Agreements

As previously discussed, the *Wade* Court held that when a prosecutor fails to file a substantial assistance motion, the prosecutor's discretion is reviewable only if motivated by unconstitutional prejudices.[286] For example, if the prosecutor decided not to file a

279. See *infra* Part III.A.
280. See *infra* Part III.B.
281. See *infra* Parts III.B.4.a-d.
282. See *infra* Part III.C.
283. *See* Santobello v. New York, 404 U.S. 257, 260-61 (1971).
284. 504 U.S. 181 (1992).
285. *See id.* at 185-86.
286. *See id.* Wade pled guilty to a crime without the protection of a plea agreement, but nonetheless spontaneously offered the prosecutor information, presumably in the hopes that his sentence would be reduced. *See id.* The prosecutor readily accepted the information and used it to his benefit, but offered no substantial assistance motion. *See id.*

substantial assistance motion due to the defendant's race, sex, or religious affiliation, a court could independently review the assistance provided by the defendant.[287] According to *Wade*, before a court will allow discovery or an evidentiary hearing about a defendant's accusation of unconstitutional prosecutorial motivation, a defendant must make a "substantial threshold" showing that the government's refusal to file the substantial assistance motion was based on an unconstitutional motive or was "not rationally related to any legitimate [government] end."[288] In *Wade*, the defendant never entered into a plea agreement with the prosecutor, but rather volunteered all information.[289] Therefore, in writing for a unanimous Court, Justice Souter did not address the judicial reviewability of a prosecutor's failure to file a substantial assistance motion in the context of a written plea agreement.[290] If the facts had been different, however, the Court may have decided to extend its analysis and examine the issue of prosecutorial discretion and sole discretion substantial assistance motions.

The major argument against applying *Wade* in cases involving sole discretion clauses is that *Wade* did not involve a written plea agreement.[291] Courts that refuse to apply *Wade*[292] note that the defendant in *Wade* bargained away nothing,[293] and therefore *Wade* is distinguishable from those cases involving a written sole discretion substantial assistance agreement. Thus, the reviewing courts argue that since *Wade* is factually distinguishable from the written plea agreement situation, the court is not limited by the restrictive language used in *Wade*, and is free to examine the agreement based on

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287. *See id.*

288. *Id.* at 186.

289. *See id.* at 183.

290. Therefore, the Supreme Court left the lower courts to ponder the *Wade* implications on their own. *See* Fisher, *supra* note 99, at 762 (stating that "Justice Souter's failure to resolve the apparent ambiguities in § 5K1.1, his failure to address plea agreements, and his failure to reconcile the disagreement in the circuits demonstrate his unwillingness to make [*Wade*] significant"). Many courts have held that *Wade* is distinguishable from sole discretion plea agreements and therefore not applicable. See *supra* Part II.B for a thorough discussion of the circuits that allow courts to review a prosecutor's refusal to file a substantial assistance motion.

291. *See* United States v. Isaac, 141 F.3d 477, 482 (3d Cir. 1998) (stating that "[a] close reading of *Wade* indicates that its teachings are confined to situations in which there is no plea agreement").

292. See *supra* Part II.B for a discussion of the reviewing circuits and their refusal to apply *Wade*.

293. *See Isaac*, 141 F.3d at 483 ("[T]he difference between the situation now before us and that in *Wade* is that the defendant here has bargained away important rights.").

contract theory.[294]

While it may appear obvious to the reviewing circuits that *Wade* is distinguishable from cases involving sole discretion substantial assistance plea agreements, a cost-benefit analysis demonstrates that both situations are quite similar. Therefore, it may not be possible to completely discard *Wade*, as the reviewing courts attempt to do.

A cost-benefit analysis simply examines the effects of external factors (cost) on future decision-making (benefit). The cost-benefit analysis of *Wade* reveals the following costs and benefits. In *Wade*, the risk of being imprisoned was very high. In an attempt to reduce his sentence, the defendant offered (without a plea agreement) all the crime-related information he possessed.[295] Despite the fact that the government found the information very helpful, the government never agreed to file a substantial assistance motion.[296]

This same cost-benefit equation fits the sole discretion substantial assistance situation as well. Regardless of the presence of a written plea agreement, the risk of lengthy imprisonment is still very high because the Guidelines require imposing a predetermined sentence. In addition, while the defendant attempts to reduce the high risk of imprisonment by revealing all criminal information, the sole discretion agreement guarantees nothing in return since the decision to award the substantial assistance motion rests entirely with the prosecutor.[297]

Hence, both situations end with a high risk of imprisonment and a low guarantee of a reduced sentence, no matter how "substantially" the defendant assists the government. In either the *Wade* or the sole discretion plea agreement situation, the government has the right not to file a downward departure motion. Moreover, in either circumstance, the government is under no obligation to use objective factors in its decision of whether or not to file the motion. Consequently, the court cannot easily review the prosecutor's decision.

Therefore, despite the factual distinction between the two situations, the cost-benefit analysis reveals that the difference may be insignificant. If the difference is in fact insignificant, it would appear that *Wade* must also apply to the sole discretion substantial

294. *See id.* at 481 n.1.

295. *See generally* Wade v. United States, 504 U.S. 181 (1992).

296. *See id.* at 183.

297. See *supra* Part I.B.3 for a discussion of prosecutorial discretion.

assistance cases. Thus, a prosecutor's decision in a sole discretion substantial assistance case should be reviewable only upon unconstitutional grounds.

Although this is a logical reason for applying *Wade* to sole discretion substantial assistance cases, other considerations should also be taken into account. To ensure fairness and justice, courts may have a stronger interest in reviewing cases in which the defendant actually contracted for a specified term. Wade offered information uncoerced and without any exchange.[298] Conversely, defendants who do not volunteer information freely, but rather bargain away the information for an increased chance of freedom, should be allowed to attack the agreement and require specific performance in the form of a 5K1.1 motion.[299] Although it is not possible to require specific performance of a clause that is not obligatory, it is possible to require the parties to act in good faith, and any actions to the contrary would permit the court to force the prosecutor to file the motion. Both defendants in the cost-benefit analyses gave valuable consideration in the form of a bargain in exchange for a potentially shorter sentence. While the cost-benefit analysis of substantial assistance plea agreements may be essentially identical to *Wade*, in order to uphold the integrity of the justice system, courts should discard *Wade* in sole discretion substantial assistance cases and allow good faith and other contract principles to become part of the enforceability determination.[300]

Allowing a court to review the prosecutor's decision not to file a substantial assistance motion would be a further check on prosecutorial discretion. After all, the sentencing judge is the one who determines the defendant's exact sentence.[301] This examination would also further ensure the integrity of the judicial system by allowing an objective outside party to view the various factors the prosecutor considered when making the decision whether or not to file a 5K1.1 motion.

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298. *See Wade*, 504 U.S. at 183.

299. *See generally Isaac*, 141 F.3d at 481; *see also* United States v. Pollack, 91 F.3d 331, 334-35 (2d Cir. 1996). In *Pollack*, the court stated that "where the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the judgment of the prosecutor, the prosecutor may reject the defendant's performance provided he or she is honestly dissatisfied." *Id.* at 335 (quoting United States v. Rexach, 896 F.2d 710, 713 (2d Cir. 1990)). "The government's dissatisfaction, however, cannot be premised on bad faith, invidiousness, or dishonesty." *Id.*

300. See *infra* Part III.B for a more detailed discussion of the policy issues behind allowing the application of contract principles to substantial assistance motions.

301. *See supra* notes 6-10 and accompanying text.

The non-reviewing circuits hold that "sole discretion" bestows an absolute power upon the prosecutor: the sole discretion agreement "plainly reserves the government's [own] discretion to receive information from the defendant and then exercise its discretion on whether to file for a downward departure."[302] Consequently, these circuits seem to imply that the simple presence of "sole discretion" language forecloses any possibility that the agreement is a contract, and thus reviewable.[303] This implication ignores the fact that plea agreements, notwithstanding the "sole discretion" language, contain all the basic elements of a contract.

A contract is "[a]n agreement between two or more persons which creates an obligation to do or not to do a particular thing."[304] At common law, contract formation merely required (a) offer and acceptance and (b) consideration.[305] Plea agreements satisfy both elements, notwithstanding the fact that the agreement arises in the criminal context. Regardless of the circumstances in which a contract arises, its existence remains undisputed provided that all of the essential elements are present. The defendant has an obligation to provide substantial information and the government has an obligation to fairly evaluate the information in determining whether the information is "substantial." A plea agreement contains a bargained-for exchange, consideration, and mutual assent, which culminates in a formal, written, and signed document which contains all the essential elements of a contract.

A legal agreement, whether it be a civil or a criminal plea agreement, must be reviewable under basic contract principles.[306] It appears that the only reason the non-reviewing courts refuse to apply contract law to the plea agreement is the presence of sole dis-

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302. United States v. Garcia-Bonilla, 11 F.3d 45, 47 (5th Cir. 1993).

303. *See, e.g.*, United States v. Walton, No. 97-3138, 1998 WL 544310, at *4 (10th Cir. Aug. 26, 1998) (unpublished opinion); United States v. Courtois, 131 F.3d 937, 938-39 (10th Cir. 1997); United States v. Aderholt, 87 F.3d 740, 742 (5th Cir. 1996).

304. BLACK'S LAW DICTIONARY 322 (6th ed. 1990); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

305. *See* Richard L. Savage, *Laying the Ghost of Reliance to Rest in Section 2-313 of the Uniform Commercial Code: An "Endpoints" Analysis*, 28 WAKE FOREST L. REV. 1065, 1084 (1993) (citing EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 252-53 (4th ed. 1991)).

306. *See* United States v. Isaac, 141 F.3d 477, 481 (3d Cir. 1998). In *Isaac*, the court stated that "'although a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law principles.'" *Id.* (quoting United States v. Moscahlaidis, 868 F.2d 1357, 1361 (3d Cir. 1989)).

cretion language. However, the sole discretion language is not separate from the agreement itself, but rather it is just another component of the contract. Indeed, the "sole discretion" language is only one of many clauses that make up the entire plea agreement contract.[307] It is illogical that the presence of the words "sole discretion" would automatically invalidate the classification of a plea agreement as a contract. Any other classification contradicts basic legal principles.

Although the non-reviewing circuits do not apply contract principles when examining a prosecutor's decision not to file a sole discretion downward departure motion,[308] one of the non-reviewing circuits may be reconsidering its position.[309] In contrast to those courts that have explicitly refused to apply contract principles to "sole discretion" plea agreements based on *Wade v. United States*,[310] the Seventh Circuit gave serious consideration to reviewing the agreements. For example, in *United States v. Burrell*,[311] although the court ultimately held that sole discretion plea agreements are not worthy of contract theory invalidation, the court closely examined the contract arguments.[312] The court considered that "[a] guilty plea induced by an unkept bargain is involuntary [and therefore] the court must allow the defendant to withdraw the plea and to start all over."[313] Thus, the Seventh Circuit may be willing to reconsider the issue and allow rescission of a plea agreement if the right facts present themselves, such as in a case in which the prosecutor's decision resulted in blatant injustice. Should the Seventh Circuit ever decide to review plea agreements, the basis of such a decision would probably rest on the potential coercion of the agreement, as opposed to contract formation.[314]

United States v. Fairchild,[315] presented another example of the Seventh Circuit's hesitation to deny reviewability of plea agreements. The court expressed concern over the prosecutor's absolute

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307. *See* Hughes, *supra* note 36, at 2-3 & n.4; *see also* United States v. Price, 95 F.3d 364, 366-67 (5th Cir. 1996) (demonstrating a sole discretion clause); Adamson v. Ricketts, 789 F.2d 722, 737 (9th Cir. 1986) (demonstrating a multi-clause plea agreement), *rev'd*, 483 U.S. 1 (1987).

308. See *supra* Part II.A for a more detailed examination of the circuits that do not review prosecutorial discretion.

309. *See generally* United States v. Fairchild, 940 F.2d 261, 266 (7th Cir. 1991).

310. 504 U.S. 181 (1992).

311. 963 F.2d 976 (7th Cir. 1992).

312. *See id.* at 985.

313. *Id.* (quoting United States v. Smith, 953 F.2d 1060, 1066 (7th Cir. 1992)).

314. *See id.*

315. 940 F.2d 261 (7th Cir. 1991).

discretion.[316] The court stated that "[n]othing in the plea agreement . . . gives away the government's discretion" to decide whether or not to make the motion, thus, there is no reason to review the government's decision not to file a downward departure motion.[317] However, the court stated that the government should clearly define "substantial assistance" in objective terms.[318] The court stated that "the government [should not] take advantage of a defendant's ignorance of the [caselaw on] substantial assistance so as to mislead him into believing" that the government will file a downward departure motion if the defendant acts in good faith.[319] Although the Seventh Circuit ultimately refused to classify the agreement as a contract, it appears that the court may be heading in that direction.[320]

More objectivity in the plea bargain agreement would serve a dual purpose. It would be useful (1) for the defendant to know exactly what is expected of him prior to signing the agreement; and (2) as a method for courts to ensure that the agreement is fulfilled. For instance, if the agreement defined substantial assistance as "information that directly leads to the prosecution of another," and the defendant did in fact procure such information, the court could easily question the government's motives if the government failed to file a 5K1.1 motion. The drawback to this "objective definition" solution is that the defendant's incentive to reveal information beyond what is required by the agreement disappears. This approach would also put tremendous pressure on the prosecutor to gauge how much information the defendant actually knows at the outset of plea negotiations—a nearly impossible task.

2. Judicial Reviewability of Prosecutorial Discretion

Prosecutors and defendants rarely appeal sentence departures

316. *See id.* at 266.

317. *Id.*

318. *See id.* An objective substantial assistance agreement might, for example, include a definition of substantial assistance. This definition would vary from defendant to defendant because each case would be unique. Such a definition might read as follows: "Substantial assistance, for purposes of this agreement, requires that you, the defendant, will provide information that directly leads to the prosecution of one of your suppliers. We, the government, must receive this substantial assistance prior to filing a § 5K1.1 motion." While this solution would not forbid a sole discretion clause, it would make the test more objective and promote fairness. The defendant would at least know, prior to the signing of the agreement, that he must assist in some specified manner before the government will consider filing a downward departure motion.

319. *See id.*

320. *See id.*

for two reasons. First, the government must file a motion prior to the court granting a substantial assistance departure.[321] This requirement implies that the government has agreed to a sentence departure, and therefore, the government is unlikely to appeal. Second, defendants are unlikely to appeal because downward departures are generally to their benefit.[322] Even when a party does appeal, appellate courts routinely refuse to hear objections because upon receipt of the government's substantial assistance motion, the court has unfettered discretion whether to grant or deny the motion.[323] Due to the court's unwillingness to review sentencing departures, "prosecutors 'are free to be lenient or harsh . . . without public[ ] explan[ation]'" or defense of their decisions.[324] This result has led many to believe that courts have unknowingly undermined the underlying goals of uniformity and fairness of the Guidelines because prosecutors are allowed to act with virtually no judicial intervention.[325]

There is little opportunity to check the constitutionality of prosecutorial decisions because of the "private nature" of prosecutorial decision making.[326] When the prosecutor makes a decision, there is no public proceeding where the prosecution must present its legal theories in support of its decisions.[327] Whatever

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321. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (stating that "[u]pon motion of *the government* stating that the defendant has provided substantial assistance" the court may depart from the guidelines) (emphasis added).

322. *See* Lee, *infra* note 327, at 206.

323. *See* United States v. Pippin, 903 F.2d 1478, 1485 (11th Cir. 1990); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (stating that upon meeting the filing requirements of 5K1.1, "the court *may* depart from the guidelines") (emphasis added).

324. Gyurci, *supra* note 13, at 1272-73 (quoting *Testimony of the President of the Federal Judges Association, Honorable John M. Walker, Jr.*, 6 FED. SENT. REP. 72, 72 (1993)).

325. *See id.*

326. *See* Lee, *supra* note 4, at 168. Prosecutors are under no obligation to document any analysis done in the contemplation and resolution of an issue. *See id.* at 168-69. Therefore, all cognitive decisions risk being interwoven with bias, prejudice, and bad faith since no mechanism exists to observe a prosecutor's decision-making thought process, although, courts will review prosecutorial decisions if there is evidence that such a decision was based on an impermissible ground, such as race or religion. *See id.* at 169 n.272.

327. *See* Cynthia K. Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 237-39 (1997) (stating that there is little opportunity to check prosecutorial decisions, unlike in the judicial arena, where every decision is carefully recorded and subject to intense review).

the decision may be, it is almost always unreviewable.[328]

In contrast to prosecutorial decisions, judges must state their reasons for imposing a particular sentence in open court.[329] Moreover, any decision by the judge to depart from the Guideline's range is subject to appellate review.[330] All judicial decisions "must be grounded on articulated facts and legal theories stated on the open record."[331] This system ensures a fair and just decision by the judiciary. The judiciary could require prosecutors to be bound by the same candor and documentation system in order to review prosecutorial discretion in the context of substantial assistance or sole discretion plea agreements.

If a court concludes that plea agreements are contracts, it could also easily apply basic contract principles[332] to ensure fairness and justice. This would let defendants know prior to entering into the agreement that although the government expects them to provide substantial assistance, the government must measure their satisfaction in good faith.[333] Further, defendants would know that a claim that the government acted in bad faith, supported by some defined minimal evidence, would give them a chance to have the court examine the prosecutor's discretion.[334]

B. *Sole Discretion Plea Agreements and Contract Principles*

Santobello v. New York[335] stands for the proposition that when a prosecutor specifically agrees to act pursuant to a signed plea agreement, the prosecutor is bound to that agreement.[336] If contract principles are applied to plea agreements, the application may indeed have the effect of limiting prosecutorial discretion and increasing court intervention. Regardless of potential drawbacks, justice and fairness would be better served if courts were to view sole discretion plea agreements as contracts.

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328. *See id.*

329. *See id.* at 238.

330. *Id.*

331. *See id.* (citing United States v. Boshell, 728 F. Supp. 632, 637-38 (E.D. Wash. 1990), *vacated in part, aff'd in part*, 952 F.2d 1101 (9th Cir. 1991)).

332. See generally *supra* Part II.B for a discussion of the courts that have applied contract principles to plea agreements.

333. *See* United States v. Isaac, 141 F.3d 477, 483 (3d Cir. 1998).

334. *See id.* at 482-83.

335. 404 U.S. 257 (1971).

336. *See id.* at 262.

1. Should Courts Apply *Santobello* and Contract Principles?

"Plea bargains are, as the name suggests, *bargains* . . . ."[337] Therefore it seems only natural that courts should regulate and evaluate plea agreements as any other bargaining agreement.[338]

A typical criminal plea bargain may take place in a courthouse hallway between the attorney for the defendant and the prosecutor, lasting only minutes.[339] The simplicity of the transaction may be surprising to outside observers since the outcome of this quick "bargain" will affect years of a defendant's life.[340] While apparently a simple transaction, this type of bargain involves several complex contractual elements.[341] In addition, these "bargains" serve a great purpose in the judicial system: they promote judicial efficiency by eliminating the need for a criminal trial.[342]

In contrast to the simple hallway plea, complex plea agreements are common when defendants are facing serious or multiple criminal accusations. These more complex bargains may involve cooperation agreements and multiple contested issues that involve months of negotiation before the parties reach a resolution.[343] These complex plea negotiations culminate in extremely complex and long written agreements.[344]

The reviewing circuits correctly apply contract principles when examining a prosecutor's decision not to file a sole discretion down-

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337. Scott & Stuntz, *supra* note 44, at 1910 (emphasis in original).

338. *See id.*

339. *See id.* at 1911-12. The authors state that:

> [M]ost cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then "sold" to both the defendant and the judge. To a large extent, this kind of horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.

Id.

340. *See* United States v. Atkinson, 15 F.3d 715, 716 (7th Cir. 1994) (describing an example of a bargain in which the defendant's sentence was reduced from 405 months to 300).

341. See *supra* notes 304-305 and accompanying text for a discussion of the contractual elements present in a plea bargain.

342. *See* Saris, *supra* note 178, at 1052 (stating that nearly ninety percent of all cases are resolved through a plea agreement rather than a jury conviction).

343. *See* Hughes, *supra* note 36, at 2-3.

344. *See id.* at 2-3 & n.4; *see also* Adamson v. Richetts, 789 F.2d 722, 737 (9th Cir. 1986) (en banc) (stating that the defendant's signature was on page five of the plea agreement), *rev'd* 483 U.S. 1 (1987).

ward departure motion.[345] Generally, the reviewing circuits have stated that although *Wade v. United States*[346] "outlined a narrow space for a defendant to challenge the government's refusal to file a 5K1.1 motion in the absence of a plea agreement," i.e., refusal to file the motion based on unconstitutional motivations, it did not instruct the courts on how to deal with written plea agreements.[347]

Rather than applying *Wade* to the issue of judicial reviewability of prosecutorial discretion, the reviewing circuits generally apply *Santobello v. New York*,[348] which applied contract principles to plea agreements.[349] "[O]nce the government makes an agreement with a defendant to file a [section 5K1.1] motion, it is bound by the terms of the agreement. It is a simple matter of contract law."[350] Applying contract principles to a prosecutor's refusal to file a substantial assistance motion under 5K1.1 requires the existence of a contractual relationship between the defendant and the government. Because *Wade* is inapplicable, the court may examine the prosecutor's discretion for reasons beyond those of unconstitutional motives.[351] The reviewing circuits correctly recognize that sole discretion plea agreements contain all the essential elements of a contract, and therefore basic contract principles must apply.[352]

Applying contract principles to plea agreements would also promote judicial economy. It is more useful to have a uniform "bright-line" rule that classifies all plea agreements as contracts, as opposed to having all the circuits examining each individual plea agreement to determine whether it possesses all the necessary contractual elements. Thus, "'where the agreement is conditioned on satisfaction of the obligor, the condition is not met "if the obligor is honestly, even though unreasonably, dissatisfied."'"[353] According

345. See *supra* Part II.B for a discussion of the circuit cases that hold that courts may review prosecutorial discretion.

346. 504 U.S. 181 (1992).

347. *See* United States v. Isaac, 141 F.3d 477, 481-82 (3d Cir. 1998) (stating that *Wade*'s holding is limited to situations where no plea agreement was ever made).

348. 404 U.S. 257 (1971).

349. *See id.* at 262-63 (stating that plea agreements are specifically enforceable (a contract remedy) against the government if the government breached the agreement). See *supra* Part I.B.4.a for a discussion of *Santobello*.

350. United States v. Carrara, 49 F.3d 105, 107 (3d Cir. 1995).

351. *See generally* United States v. Jones, 58 F.3d 688, 692 (D.C. Cir. 1995) (stating that any review of a plea agreement includes an investigation into "good faith").

352. *See id.* at 691 ("[A] plea agreement is a contract."); *see also Isaac*, 141 F.3d at 481-84 (reviewing the plea agreement between the defendant and the government).

353. *Isaac*, 141 F.3d at 482 (quoting United States v. Rexach, 896 F.2d 710, 713 (2d Cir. 1990) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979))).

to the court, there is an implied obligation of good faith and fair dealing in every contract.[354]

Moreover, the usefulness of presuming a plea agreement to be a contract is beneficial, not only to the court itself, but also to the defendant. If the defendant is made aware of the contractual status prior to the signing of the plea agreement, the defendant will be able to make a more informed choice in deciding whether to plead guilty and give up his or her constitutional rights associated with a trial. Applying contract principles to plea agreements allows predictability, consistency, and fairness.[355] By concluding that plea agreements are contracts, courts afford the defendant the protections associated with the judicial determination of the enforceability of the contract.

2. Enforceability of the Plea Agreement

"The bargain theory of contract has dominated American jurisprudence for well over a hundred years. Its remarkable durability rests on a single idea: contracting parties can (and do) reach mutually beneficial agreements that fully exploit the potential returns from their joint enterprise."[356] While bargain theory is a sound concept, when courts apply bargain theory to sole discretion plea agreements, trouble arises.[357]

"[C]lassic contract theory supports a presumption favoring the

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354. *See id.*

355. *See* Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 583 (1999). The author stated:

> Plea agreements are contracts of adhesion. Although courts analyze them according to ordinary contract principles, they supplement those principles 'with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause.' That means courts will hold the government to a high level of responsibility in dealing fairly and honestly with defendants during plea bargaining.

Id. (citation omitted).

356. Scott & Stuntz, *supra* note 44, at 1935.

357. *See* Recent Case, *Plea Agreements—Ninth Circuit Allows Post-Plea Agreement Collateral Attack Based on Change in Underlying Law*—United States v. Sandoval-Lopez, 122 F.3d 797 (9th Cir. 1997), 111 HARV. L. REV. 603, 608 (1997). According to the author:

> The court's selective use of contract doctrine suggests that it did not fully stand behind its assertion that plea agreements are contracts. Although the *Sandoval-Lopez* panel suggested otherwise, the Ninth Circuit has not fully applied contract principles to plea agreements. . . . [A]lthough courts must use contract principles to review plea agreements based on breach claims, they cannot consider some contract defenses, such as the mistake of fact doctrine.

Id.

enforcement of plea bargains."[358] However, if courts examine sole discretion plea agreements under contract theory, many of the agreements would become invalid and result in excess litigation, thus frustrating one purpose of the Guidelines: judicial economy.[359] Specifically, defendants might consistently raise contract defense arguments and force judicial intervention. Thus, instead of parties arguing about the guilt or innocence of a defendant, or the important factors in the case, the court battle would center on the enforceability of the plea agreement under contract law.

Critics disagree as to whether courts should invalidate plea agreements under the contract principles of lack of good faith, duress, illusory promise, and unconscionability.[360] While it may seem extraordinary "to look to contract theory to find reasons for prohibiting contracts that allocate criminal punishment, . . . contract law routinely embraces arguments for limiting itself."[361] In other words, contract law embraces various methods by which it can police itself. For example, if the defenses to enforceability fail, contract enforcement will prevail. Although the reviewing courts have explicitly recognized only a duty to act in good faith, one could argue that the doctrines of illusory promise, unconscionability, and duress are also defenses that could force invalidation of sole discretion plea agreements.

a. Duty to bargain and act in good faith

The common law of contracts requires that contracting parties engage in certain activities and behave in a certain manner in order to successfully create a legally binding agreement.

> [I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied

358. Scott & Stuntz, *supra* note 44, at 1918.

359. See *supra* Part I.A.4 for a discussion of the need to economize judicial resources.

360. *See generally* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) (arguing that all plea bargaining is inherently unfair); *cf.* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1040-45 (1984) (stating that there will always be plea bargaining due to limited judicial resources and a sense of "doing justice").

361. Scott & Stuntz, *supra* note 44, at 1918 (arguing that contract law has several theoretical tools to invalidate contracts, such as unconscionability, duress, vagueness, lack of mutual assent, and lack of consideration. Therefore, contract law, when properly applied, can police itself).

covenant of good faith and fair dealing.[362]

The phrase "good faith" exists in a variety of contexts, and its meaning varies somewhat with each context. "Good faith performance . . . of a contract emphasizes faithfulness to an agreed [upon] common purpose and consistency with the justified expectations of the other party."[363] In essence, good faith condemns types of conduct characterized as "'bad faith' because they violate community standards of decency, fairness or reasonableness."[364] Although a complete catalogue of what constitutes bad faith is not possible, the following activities have been recognized as demonstrating bad faith: "evasion of the spirit of the bargain . . . willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance."[365] A prosecutor engaged in any of these activities clearly frustrates the defendant's chance of receiving a just result.

For example, when party A to a contract gives party B discretion in the performance of some aspect of the contract, the parties ordinarily assume that B will only exercise that discretion for a purpose reasonably contemplated by the parties.[366] If B exercises his discretion for purposes not contemplated by the parties, B has performed in bad faith.[367]

In the case of a plea agreement, assuming that the agreement is a contract, as long as there is some evidence to support the claim that the prosecutor acted in bad faith, the defendant may ask the court to review the agreement regardless of the fact that the prosecutor reserved discretion to file the motion.[368] However, the defendant would still have to prove that the prosecution acted in bad faith, notwithstanding any discretionary language contained in the agreement.[369] The defendant must show that his performance sub-

362. Uproar Co. v. National Broad. Co., 81 F.2d 373, 377 (1st Cir. 1936).

363. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979) (discussing the definition of good faith as utilized in varying contexts). See *supra* note 265 for the definition of good faith.

364. RESTATEMENT (SECOND OF CONTRACTS) § 205 cmt. a (1979).

365. *See id.* § 205 cmt. d.

366. *See* Stephen J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369 (1980).

367. *See id.*

368. *See* United States v. Jones, 58 F.3d 688 (D.C. Cir. 1995) (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979)).

369. See CALAMARI & PERILLO, *supra* note 14, at 504 (stating that "[t]he dissatisfaction must be actual and not merely simulated. Under the good faith test, it is difficult for the plaintiff to prevail").

jectively satisfied the prosecutor, and the prosecutor has other motives for testifying as to his dissatisfaction.[370] Therefore, if the defendant wanted to have the prosecutor's refusal to file the substantial assistance motion reviewed for lack of good faith, the defendant would have to establish the prosecutor's "true state of mind by evidence showing that [the prosecutor] made statements giving other reasons for his rejection of the performance."[371]

Although seemingly a burden on prosecutors and the integrity of the judicial system in general, the drastic consequences of the prosecutor's decision outweigh these potential burdens. If the result of analyzing plea agreements under contract principles causes prosecutors to be held liable for their administrative decisions, then prosecutors will be forced to carefully analyze the benefit they actually received from the defendant. This consequence can only benefit the legal system by balancing the relative positions of the parties.

According to some authorities, evidence of the unreasonableness of the prosecutor's expressed satisfaction is admissible to justify an inference of bad faith.[372] For example, if the court finds that the prosecutor acted unreasonably due to the overall extent of the defendant's assistance, the judge may infer the prosecutor acted in bad faith and had unreasonable expectations.

In addition to bad faith, another defense to contract enforcement is duress: a claim that one party exerted intense pressure over the other. This factor is a variable a court should examine when determining overall enforceability of plea agreements.

b. Duress

One of the potential arguments for prohibiting plea bargaining is that duress[373] impermissibly infects such bargains. Under ordinary contract theory, a party will prevail on a duress defense if he

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370. *See id.*

371. *Id.* (stating that although the courts prefer to examine satisfaction based on reasonableness, "[i]f the agreement leaves no doubt that it is only honest satisfaction that is meant and no more [for example, sole discretion], it will be so interpreted, and the condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied") (citing RESTATEMENT (SECOND) OF CONTRACTS § 228 cmt. a (1979)).

372. *See* ARTHUR LINTON CORBIN, 3A CORBIN ON CONTRACTS § 645 (1965). The plaintiff should prevail if he can prove that the promisor is dissatisfied with his bargain rather than with the performance. *See id.*

373. *See* BLACK'S LAW DICTIONARY 504 (6th ed. 1990) (defining duress as a defense which "[s]ubject[s] [a] person to improper pressure which overcomes his will and coerces him to comply with demand[s] to which he would not yield if acting as [a] free agent").

can prove that he would not have entered into the contract but for the other party's "improperly coercive behavior."[374] Applying this principle to plea bargaining situations, supporters argue that the large difference in sentencing ranges between the Guidelines' mandatory sentence and the post-downward departure sentence "creates a coercive environment in which the criminal defendant has no real alternative but to plead guilty" and hope for a substantial assistance motion.[375] Thus, critics of the system assert that pleas produced under this type of pressure are never voluntary.[376] Consequently, the duress inherent in the bargain should invalidate the contract, or at least permit judicial review of the prosecutor's expectations. Absent the threat of losing one's freedom for an extended period, it is highly unlikely that anyone would enter into a sole discretion plea agreement since it provides no degree of reviewability. It is an illogical bargain that a defendant would not seriously consider, but for his precarious situation.

When examining the individual situation, duress is blatantly apparent. For example, if a defendant faces a congressionally predetermined sentence in excess of 300 months, and the evidence against the defendant is fairly strong, the only hope the defendant may have of escaping a severe sentence is to attempt to plea bargain with the prosecutor. In such a situation, the defendant is at the complete mercy of the prosecutor. Any proposed terms that the prosecutor dislikes will force the defendant into court. In addition, the prosecutor has the ultimate power to file the plea agreement with the court, and in substantial assistance cases, the power to decide the adequacy of the defendant's performance. This positioning allows the prosecutor to exercise the full strength of his discretionary power. Assuming the defendant wishes to avoid trial and signs a plea agreement containing a sole discretion clause, the defendant loses all of his constitutional rights associated with trial, in exchange for no guarantee of a reduced sentence.

Consider the following example: assume X wants to purchase Y's car, and Y makes the following proposal: "X, I will consider selling you my car for the fair market value. First, give me the fair market value of the automobile. Then explain to me in detail why this is the right car for you. I will later contemplate if I truly feel this is the right car for you based on your argument, and if, at my

374. *See* Scott & Stuntz, *supra* note 44, at 1919.
375. *See id.* at 1920.
376. *See id.*

'sole discretion,' I make this determination in the affirmative, I will turn the vehicle over to you. On the other hand, if I determine in my 'sole discretion' that this vehicle is not the right vehicle for you, I will keep the vehicle and fair market value you gave me." Clearly, X should not accept Y's offer because this is not a fair exchange. As with the case of a prosecutor's sole discretion plea agreement, Y's sole discretion offers little hope of fairness to X.

In both the sole discretion plea bargain situation, and the car sale example, there is no method to objectively evaluate either the prosecutor's or Y's discretion. This leaves both the defendant and X in a completely inferior position. Both the defendant and X have provided valuable consideration, and yet their subsequent actions do not guarantee any return for them. X would never accept such an offer because the consideration paid is too high for the risk of no return. In the substantial assistance plea agreement situation, although the defendant gives up more valuable consideration than X (constitutional rights), he must accept an equally high risk of no return (the prosecutor's arbitrary sole discretion standard). Sadly, the defendant takes the risk that X never would: he signs the plea agreement.

One reason for the criminal defendant's illogical decision may be duress. The defendant would argue that the government's discretion is purely subjective, with no objective factors to assist in the evaluation of the defendant's substantial assistance. Moreover, because the sole discretion language shields the prosecutor, the prosecutor can refuse to file the 5K1.1 motion for any arbitrary reason. Thus, the defendant would argue that but for the possibility of a severe criminal sentence, such a choice would not be voluntary.

c. *Unconscionability*

In addition to the duress defense, the doctrine of unconscionability[377] provides an alternative argument for invalidation of plea agreements. Typically, a plea bargain involves a simple promissory exchange: the defendant exchanges his promise to plead guilty for the prosecutor's promise to recommend a reduced sentence or file a substantial assistance motion.[378] In a sole discretion substantial assistance agreement, the defendant obtains the prosecutor's prom-

377. *See* BLACK'S LAW DICTIONARY at 1524 (6th ed. 1990) (defining "unconscionability" as "[a] doctrine under which courts may deny enforcement of unfair or oppressive contracts because of procedural abuses arising out of the contract formation, or because of substantive abuses relating to terms of the contract").

378. *See* Scott & Stuntz, *supra* note 44, at 1921.

ise to consider filing a downward departure motion upon receipt of "substantial" assistance. In this situation, a defendant who agrees to a sole discretion clause that is buried in a long and complex plea agreement may attempt to raise the defense of unconscionability.[379]

The doctrine of unconscionability serves as a kind of "backstop," or "a means of granting relief where defects in the bargaining process . . . do not rise to the level of actual fraud or duress."[380] A claim of procedural unconscionability is more similar to a claim of fraudulent concealment.[381] "'Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he entered into a one-sided bargain.'"[382] But when a party possesses little bargaining power and no real choice but to sign, "with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."[383]

Defendants, as laypeople, may not understand basic contract principles. Even if the defendant retains an attorney and reads the terms of the plea agreement, he may not understand the implications of signing the plea agreement. If the parties do not fully discuss the agreement, and the defendant does not completely understand an important clause (such as the sole discretion substantial assistance clause) prior to the signing of the agreement, the government should bear the burden of proving that the defendant understood the agreement. Without such proof, the government should bear the risk of having the agreement nullified for procedural unconscionablity.[384]

Associated with the claim of procedural unconscionability is a claim for substantive unconscionability.[385] A substantive unconscionability claim is actionable if there are "substantive abuses relating to [the] terms of the contract, such as terms which violate

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379. *See id.* at 1922.

380. *Id.* at 1921.

381. The basic test of unconscionability is whether, under circumstances existing at the time of the contract and in light of general commercial standards, a clause is so one sided as to oppress or unfairly surprise the one party. *See* Division of the Triple T Serv., Inc. v. Mobil Oil Corp., 304 N.Y.S.2d 191, 201 (N.Y. Sup. Ct. 1969).

382. PETER A. ALCES, THE LAW OF FRAUDULENT TRANSACTIONS 3-15 (1989) (citation omitted).

383. *Id.*

384. *See id.* (stating that a "court may use the procedural unconscionability doctrine to . . . abrogate the agreement altogether").

385. See *infra* note 386 and accompanying text for a definition of substantive unconscionability.

reasonable expectations of [the] parties or which involve gross disparities . . . ."[386] "'[A] contract is largely an allocation of risks between the parties, and therefore . . . a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner.'"[387] When an agreement requires that a defendant give valuable consideration at the outset of the plea bargain, and the prosecutor has the option of giving nothing in return, the prosecutor has unreasonably reallocated the risk of loss on the defendant. This unbalanced bargain involves substantive abuses amounting to a gross disparity.[388] This same argument could also lead to the conclusion that the plea bargain is an illusory promise.[389]

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386. BLACK'S LAW DICTIONARY 1524 (6th ed. 1990).

387. ALCES, *supra* note 382, at 3-19 (quoting A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 122 (Cal. Ct. App. 1982)).

388. The defendant may also argue that the theory of gross disparity requires invalidation of the entire plea agreement. In cases involving sole discretion plea agreements, the defendant forfeits all rights associated with a trial and in return receives a mere gesture that the government will subjectively consider a sentence reduction. *See* United States v. Isaac, 141 F.3d 477, 483 (3d Cir. 1998). Although freedom of contract is extremely broad, it is far from absolute. *See* Smith v. Bush, 312 F.2d 131, 133-34 (5th Cir. 1963) (stating that the government has the right to limit a person's ability to contract based on public policy, health, and safety reasons). While it is possible to waive constitutional rights by contract, there are limits, such as people cannot enter enforceable contracts to enslave themselves. *See* Anthony T. Kronman, *Paternalism and the Law of Contract*, 92 YALE L.J. 763, 775-77 (1983). In plea bargaining, the defendant literally trades the "*risk* of 'enslavement' (prison) . . . for a certainty of somewhat less enslavement." Scott & Stuntz, *supra* note 44, at 1929 (emphasis in original). Although applying contract theory to plea agreements may permit the defendant to have a plethora of defensive enforcement tools to combat unfair prosecutorial discretion, the Supreme Court's decision in *Wade* may severely limit the extent to which contract principles apply.

389. *See* Daniel Frome Kaplan, Comment, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U. CHI. L. REV. 751 (1985). The author stated:

> [I]n a commercial contract setting, for example, a court will construe as illusory, and hold unenforceable, any promise to perform that is conditioned on the promisor's discretion. Where, however, the illusory promise is made by the government in the context of plea negotiations, the prosecutor has been held to be bound to the subsequent agreement and to his promise.

Id. at 757.

Some civil cases disallowed "sole discretion" language due to its illusory essence. *See* Davis v. General Foods Corp., 21 F. Supp. 445, 446-47 (S.D.N.Y. 1937) (stating that a promise to compensate based solely on the promisor's discretion is illusory and cannot support a binding contract). Likewise, in some pre-guideline criminal cases, the court has held that sole discretion language used by the prosecutor in a plea agreement is illusory. *See* People v. Tobler, 397 N.Y.S.2d 325, 328 (N.Y. Sup. Ct. 1977) (stating that the plea bargain was unenforceable because "[t]here are considerations paramount to the power of individuals to contract . . . . [B]ecause of the significance of plea bar-

d. Illusory promise

A promise lacks consideration if the purported promisor reserves the possibility of choosing alternative performances and at least one of which does not constitute consideration.[390] For example, X offers to sell some commodity to Y at $10.00 per unit, with the quantity entirely left to Y's discretion. If Y accepts X's offer, the contract will be ruled unenforceable because Y did not provide valid consideration.[391] Y could choose to purchase nothing.

The offer proposed by the prosecutor seems analogous to the above illusory contract example. In sole discretion plea agreements, the prosecutor is merely agreeing to consider the filing of a substantial assistance motion, whereas the defendant is actually giving valuable information to the prosecutor. The information given by the defendant is valid consideration because it is an inducement to the prosecutor to enter into a contract. In contrast, the prosecutor is offering potential or future consideration (a reduced sentence for the defendant). Therefore, prior to the prosecutor filing the 5K1.1 motion, the contract is illusory, and thus invalid.

To date, no defendant has raised the illusory promise concept to invalidate a plea agreement that contains a substantial assistance clause. However, in *In re Adirondack Railway Corp.*,[392] a bankruptcy court held that if a contract is based on a condition that may

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gaining, it is important that the conduct of the Court and the District Attorney meet standards of basic fairness"). Looking at the wide-spread use of sole discretion plea agreements, it is obvious that this line of reasoning has not been accepted by the federal courts. See *supra* Parts II.A–B for examples of courts that permit sole discretion language.

390. An illusory contract exists when parties reach an agreement, but one or both parties fail to put forth actual valid consideration. An illusory promise is defined as:

> A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless (a) each of the alternative performances would have been consideration if it alone had been bargained for; or (b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

RESTATEMENT (SECOND) OF CONTRACTS § 77 (1979). These types of promises have also "traditionally been considered insufficient to support promissory estoppel liability because they are not true *promises*." Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 Sw. L.J. 841, 857 (1990) (emphasis in original).

391. *See* RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a, illus. 1 (1979).

392. 95 B.R. 867, 874 (N.D.N.Y. 1988). In *Adirondack*, a railroad corporation contracted with the state of New York to restore a rail line, but the corporation later went bankrupt. *See id.* at 868. The debtor eventually sued the state for payment for the work it had performed. *See id.* After reaching a tentative settlement, the court rejected

or may not arise, then the agreement is "a promise in form, but not in substance."[393] The court stated that statements of intention which make performance entirely optional do not rise to the level of enforceability.[394]

Although the facts of the *Adirondack* contract case are obviously distinguishable from sole discretion plea agreement cases, the court's contract analysis is applicable. Using this analysis, it appears that prosecutors who use sole discretion plea agreements are attempting to get something for nothing. Unfortunately for the prosecutor, contract law does not permit enforcement of such an agreement.

Although contract principles give the defendant additional protections and increase predictability and consistency throughout the judicial system, applying contract principles could also potentially frustrate some of the purposes behind the Guidelines. One purpose behind the creation of the Guidelines was to ensure consistent and fair sentences.[395] Applying contract principles to plea agreements would seem to enhance fairness and consistency. However, another purpose of the Guidelines was to improve judicial economy and allow sentencing that is relatively efficient and fast.[396] If contract principles are applied to plea agreements, this purpose might be frustrated.

3. Potential Negative Implications of Applying Contract Principles to Plea Agreements

Although plea agreements contain all the necessary elements of a contract, applying contract principles to plea agreements and permitting judicial review presents problems. One drawback to applying contract principles to a plea agreement is the fact that challenges to the prosecutor's decision not to file a substantial assistance motion will expend precious judicial time and resources. Because the unsatisfied defendant will use the court to resolve his dissatisfaction with the prosecutor's decision, the defendant will defeat the central purpose of plea bargaining—conserving energy and resources. If all criminal prosecutions proceeded to trial, the judi-

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its acceptance because payment by the state was subject to liens that could arise later. *See id.* at 874. This condition made the contract illusory. *See id.*

393. *Id.*

394. *See id.*

395. See *supra* Part I.B.1 for a discussion of the purposes behind the Sentencing Guidelines.

396. *See supra* Part I.B.1.

cial system would be gridlocked beyond repair.[397] Allowing plea agreement contract arguments to fill the courts' dockets may cause the courts to be just as gridlocked as they would be if all defendants went to trial.

Another drawback of permitting review of plea agreements under contract principles is the effect that such review may have on the integrity of the Guidelines. Because of the possibility of overcrowded court dockets, if courts evaluate plea agreements using contract principles, Congress would probably need to modify the Guidelines to disallow the use of sole discretion language in plea agreements. Only the removal of this tool from the prosecutor's arsenal would curb the potential major influx of additional litigation. Meanwhile, the use of sole discretion language would become a less powerful prosecutorial weapon. The threat of gridlock may also curb prosecutorial aggressiveness. It is possible that fewer criminals would be prosecuted for lack of resources. With fewer resources available, a type of selective prosecution may take place, in which only the most dangerous criminals are prosecuted. Even when criminals are prosecuted, the prosecutor may be hesitant to enter into a plea agreement because of judicial oversight and additional litigation the agreement may cause.

Notwithstanding these possibilities, it would be improper for a court to deny a defendant justice solely on this basis. Rather, contract theory applicability should be evaluated on the substantive elements of the agreement itself and not based on fear of increased or prolonged litigation. Assuming increased litigation does occur, and Congress decides not to disturb the sole discretion language in the Guidelines, justice would require the government to allocate more money to the judicial system to accommodate the influx.

To avoid both the possibility of increased litigation over plea agreements and the necessity of eliminating the sole discretion language of the Guidelines, Congress could modify 5K1.1 as I have proposed in the following section. Modification would allow an unsatisfied defendant to withdraw his guilty plea if the prosecutor refused to file a substantial assistance motion. This alternative to the current section 5K1.1 would have three benefits: (1) it would allow the prosecutor to continue to derive the benefits of the sole discre-

397. *See* STEPHEN A. SALTZBERG ET AL., CRIMINAL LAW 59 (1994); *see also* Santobello v. New York, 404 U.S. 257, 261 (1971) (stating that a "[d]isposition of charges after plea discussions is not only an essential part of the process but . . . highly desirable [because] [i]t leads to [a] prompt and largely final disposition of most criminal cases").

tion clause; (2) it would acknowledge that plea agreements are contracts; and (3) it would allow the defendant to retain his or her right to a trial without judicial intervention in the agreement.[398]

Although contract disputes can be very complex and time consuming to resolve, especially when intertwined with a criminal prosecution, the eventual outcome and protection afforded to all sides far exceeds the ensuing complexity of issues that the judiciary must resolve.

C. *A Possible Solution: The Best of Both Worlds?*

Because the majority of circuits do not allow review of prosecutorial discretion,[399] it appears from the number of cases that have recently arisen regarding this issue that many defendants are unhappy with the sole discretion plea bargaining process. In a majority of sole discretion substantial assistance cases, defendants assert that they have substantially assisted the prosecutor, yet go unrewarded—namely, the prosecution does not file a section 5K1.1 motion. To comply with a prosecutor's request for assistance, defendants have gone undercover, risked the health and safety of themselves, turned in family and friends, given up personal property, and subjected themselves to constant fear of bodily harm, all in the hopes of receiving a substantial assistance motion from the prosecutor.[400] Even when a prosecutor refuses to grant the substantial assistance motion, the assistance the defendant has given can still be used by the prosecutor to investigate and prosecute others.

The unfairness in situations such as these seems obvious. However, the non-reviewing circuits have stated that their hands are tied by the express language of the plea agreement--the government has the "sole discretion" to decide whether the defendant provided substantial assistance.[401] While sympathetic to the defendant's plight, the courts refuse to intervene.[402] Still, the government is

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398. See *infra* Part III.C for an examination of this alternative (or "back-door") clause.

399. See *supra* Part II.A for a discussion of the majority position.

400. *See, e.g.*, United States v. Knights, 968 F.2d 1483, 1485 (2d Cir. 1992) (noting that the defendant and his brother testified against a drug dealer); United States v. Kahn, 920 F.2d 1100, 1103 (2d Cir. 1990) (noting that the defendant became an informant for the government).

401. *See* Padilla v. United States, No. 95-1282, 1995 WL 590451, at *1 (8th Cir. Apr. 3, 1995) (unpublished opinion) (stating that the plaintiff had no right to a substantial assistance motion).

402. *See* United States v. Carter, 122 F.3d 469, 477 (7th Cir. 1997) (stating that

free to use the defendant's information for whatever purpose it sees fit, regardless of whether the defendant gains any benefit.[403] Not only has the government received valuable information, but it has also gained a conviction without a trial. In comparison, defendants lose their constitutional rights associated with prosecution and trial. Moreover, they have exposed themselves and their families to constant fear of revenge for the information revealed. Finally, the fate of the defendants' sentences is determined by the subjective will of the government, and if no substantial assistance motion is filed, the rigid Guidelines. Taking into account the need for some prosecutorial discretion and the importance of the defendants' constitutional rights, the following compromise would provide additional fairness to defendants and reign in prosecutors' broad and unfair discretion.

All plea agreements that include a sole discretion clause should also be equipped with a "back door" escape for the defendant. The back door clause would provide the defendant with some decision-making power by informing him or her of the prosecutor's decision concerning the substantial assistance motion and allowing him or her to make the next move. Thus, if the prosecutor decides that the defendant's information does not satisfy the government's substantial assistance definition, the defendant may then withdraw his or her guilty plea and stand trial. The back door clause should also contain a provision that prohibits the use of information obtained in the plea bargaining process against the defendant.

The following is an example of a possible "back door" clause:

> Option of Retention of Rights by Defendant in a Sole Discretion Plea Agreement[404]
>
> A) After reasonable interrogation(s) and giving the defendant an opportunity to reveal all relevant information, and upon the defendant's guarantee that he/she has no further relevant information, the Government will assess the information received based upon the following factors: importance, relevance, content, truthfulness, danger to the defendant, depth, and coverage. Upon completion of an assessment of the factors in the preceding

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"[t]his is a difficult case because . . . [of] the sympathetic considerations that [the defendant] presents. But, . . . they do not require of the district court a different exercise of discretion").

403. *See id.* at 476 (stating that it is "troubling" that the defendant provided information that convicted two drug dealers but received no benefit because of his assistance).

404. Only to be used in conjunction with the offering of a "sole discretion" section 5K1.1 motion.

> sentence, the Government will make a judgement in its sole discretion to either file the section 5K1.1 substantial assistance motion or not. If the Government is honestly satisfied with the information given by the defendant, the Government will file the section 5K1.1 motion requesting a downward departure and inform the defendant of its decision to do so. Upon the Government's decision to file the section 5K1.1 motion, and notifying the defendant as such, the "back door" option terminates.
>
> B) After a review of the factors outlined in Paragraph (A), if the Government decides that the defendant did not provide substantial information, and therefore it has decided not to file a section 5K1.1 motion, the Government shall notify the defendant. The defendant shall have five (5) days to decide to either 1) proceed with sentencing, knowing beforehand that the government will not be filing a section 5K1.1 motion; 2) attempt to reveal further information; or 3) decide to execute the option to withdraw his/her plea of guilty, and cause the case to proceed to trial with a plea of not guilty. None of the information that the defendant revealed during the plea agreement negotiations may be used against the defendant at trial, but the Government shall have the right to retain all information and use it as is seen fit so long as that use does not violate the above mentioned exception.
>
> C) The defendant may only execute the Option of Retention of Rights after the Government has denied the filing of a section 5K1.1 motion. Once the defendant has executed the Option of Retention of Rights, no further plea agreement may be negotiated with the Government in the future concerning the same charges.

This type of clause benefits both the government and defendants. Defendants retain the option to pursue their constitutionally protected rights by going to trial. Moreover, even though they have given up potentially important information (which cannot be used against them), they have removed some of the discretion bestowed upon the prosecutor. The prosecutor benefits by gaining potentially important information that may be useful in prosecuting others, but is forced to offer the 5K1.1 motion for the assistance provided or risk going to trial. Thus, inserting this additional clause in plea agreements would allow the prosecutor to maintain sole discretion, the initial choice to file the section 5K1.1 motion, and the right to use the information from the defendant regardless of the defendant's actual conviction. In return, defendants retain their constitutional rights associated with trial, but are still forced to reveal the maximum amount of information they possess if they want

to retain the possibility of obtaining a sentencing reduction through a 5K1.1 motion.

CONCLUSION

Courts are put in a difficult situation when confronted with a defendant who claims to have substantially assisted the prosecutor pursuant to a plea agreement, yet is not the recipient of a downward departure motion. Most courts defer to the sole discretion language contained in the plea agreement and hold that the defendant is without remedy despite possible blatant unfairness to the defendant. Some courts, prompted by this unjust outcome, have examined the plea agreements and held that regardless of their criminal nature, they are in fact contracts to which contract principles apply when analyzing their enforceability. This acknowledgment has led some courts to review the prosecutor's decision not to file the substantial assistance motion using the basic contract principles of good faith.

Despite the acknowledgement of contract formation by some courts, a circuit split exists. The non-reviewing circuits have applied *Wade v. United States*,[405] and permit review of prosecutorial discretion only if the motivation behind the prosecutor's decision was unconstitutional.[406] Conversely, the reviewing circuits have held that *Wade* is factually distinguishable and does not limit a court's right to use basic contract principles to review a prosecutor's decision not to file a substantial assistance motion.[407]

Substantial assistance plea agreements are contracts and courts should examine their enforceability based on contract theory restrictions. Plea agreement formation and contract formation are identical, therefore justice requires that a defendant who is a party to a plea agreement be given the same protections as if he or she was a party to a contract. Although there are drawbacks to viewing a plea agreement as a contract, fairness to the defendant outweighs the potential risks to the efficiency of the justice system.

The issue at hand will not be resolved until the United States Supreme Court decides a sole discretion substantial assistance case, although a statutory modification could ultimately resolve the cir-

405. 504 U.S. 181 (1992).

406. *See id.* at 185-86; see also *supra* Part II.A for a discussion of the courts that do not review prosecutorial decisions for anything but unconstitutional motivations.

407. See *supra* Part II.B for a discussion of the courts that do allow review of prosecutorial decisions based on contract rights.

cuit split without becoming submerged in the underlying theoretical contract arguments. The solution is a compromise that ultimately would allow both parties to walk away from a plea agreement with some benefit, even if the agreement as a whole does not work out. While prosecutorial discretion is vital to the functioning of the judicial system, at times its review is necessary in order ensure justice.

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